Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 2000

ROBERT SCHEIDING, *et al.*,

Petitioners,

v.

GENERAL MOTORS CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court of the State of California

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Supreme Court of California erred by holding, in direct conflict with decisions of at least five other state courts of last resort, that the Locomotive Boiler Inspection Act (BIA) of 1911 preempts any state law tort claims in areas where the federal government has not regulated the subject matter?

2. Whether the Supreme Court of California erred in extending the BIA's preemptive scope to state law tort claims, relying on this Court's decision in *Napier v. Atlantic Coast Line R. Co.* , 272 U.S. 605 (1926); although in that case this Court neither addressed whether the BIA preempts state law tort claims, nor has this Court settled this point in any subsequent decision.

PARTIES TO THE PROCEEDING

To the best of Petitioners' knowledge, the caption names all parties to this action, including the petitioners/plaintiffs in consolidated companion cases: Harry Goodyear, Victor Hellquist, Gaylord Blackburn and Billy Umphriss.

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OPINIONS IN THE CASE

1. *Scheiding v. General Motors Corp.*, 65 Cal.App.4th 1310, 77 Cal.Rptr.2d 339 (1998), attached hereto as Appendix 27a.

2. *Scheiding v. General Motors Corp.*, 22 Cal.4th 471 (2000), attached hereto as Appendix 1a.

JURISDICTION

This Court has jurisdiction to review the decision of the California State Supreme Court pursuant to 28 U.S.C. §1254.

STATUTORY PROVISIONS INVOLVED

The Boiler Inspection Act of 1911, as originally codified at 45 U.S.C. §3 et seq. (Feb. 17, 1911, Ch. 103, 36 Stat 913), was recodified in 1994 without substantive change at 49 U.S.C. §§20701-20903. The Act presently provides in pertinent part:

> **49 U.S.C. §20701**. A railroad carrier may use or allow to be used a locomotive or tender on its railroad line only when the locomotive or tender and its parts and appurtenances
>
> > (1) are in proper condition and safe to operate without unnecessary danger of personal injury;
> >
> > (2) have been inspected as required under this chapter and regulations prescribed by the Secretary of Transportation under this chapter; and
> >
> > (3) can withstand every test prescribed by the Secretary under this chapter.

Petitioners do not cite to any federal regulatory provisions relevant to this petition, as none exist. No federal agency has ever regulated the subject matter, specifically, the use of asbestos by locomotive manufacturers.

Authority for the BIA's enforcement originally vested in the Interstate Commerce Commission, and in 1966 was transferred to the Secretary of Transportation. The Secretary's functions are executed by the Federal Railroad Administration ("FRA"), an agency of the Department of Transportation.

The BIA is a substantive amendment to the Federal Employers' Liability Act ("FELA"), which is therefore also relevant. FELA provides an exclusive remedy for injuries sustained by a railroad employee against the railroad

employer; but is obviously silent concerning injuries caused by defective locomotive products:

> **45 U.S.C. §51 et seq.** Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories...shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee...for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery...or other equipment.

STATEMENT OF THE CASE

This action arises from consolidated state law tort claims by railroad workers and their survivors against General Motors Corporation (GM) for asbestos-related injuries and deaths suffered as a result of exposure to asbestos in locomotives which GM manufactured.

Robert Scheiding, Gaylord Blackburn, Billy Umphriss, Harry Goodyear and Victor Hellquist worked for decades on various railroads. The careers of these men brought them into contact with GM's diesel electric locomotives which undisputedly contained asbestos in various component parts. Their occupational exposure to asbestos-containing locomotive components caused each of them to develop debilitating asbestos-related respiratory diseases.

Robert Scheiding worked as an electrical engineer on GM's diesel-electric locomotives at the Southern Pacific Railroad from 1950 through 1957. He was subsequently diagnosed with asbestosis and asbestos-related pleural

disease. Gaylord Blackburn repaired the electrical controls, turbines and electrical wiring on GM's locomotives while he worked on the Western Pacific Railroad from 1946 through 1961 as an electrician. On July 7, 1992, he was diagnosed with asbestos-related pleural disease.

Billy Umphriss worked on GM's diesel-electric locomotives as an engine supplyman and fireman on the Union Pacific Railroad from 1941 through 1942 and again from 1950 through 1961. In May 1994, he was diagnosed with asbestosis and asbestos-related pleural disease; in September of the same year he was diagnosed with a separate asbestos-related disease: lung cancer. Harry Goodyear was a railroad machinist and locomotive mechanic, and repaired GM's locomotives from 1952 through 1983. He was later diagnosed with asbestosis and asbestos-related pleural disease, which caused his death in 1993. His claim against GM is brought by his personal representative for the benefit of his survivors.

Victor Hellquist worked on GM's locomotives as an assemblyman and pipefitter, overhauling the railroad cars, from 1950 through 1985 on the Atchison, Topeka & Santa Fe Railway. On August 12, 1993, he was diagnosed with malignant mesothelioma, an always-fatal cancer uniquely caused by asbestos exposure. See *Hamilton v. Asbestos Corporation Ltd.*, 22 Cal.4th 1127, 998 P.2d 403, 95 Cal.Rptr.2d 701, 702 (2000). Two and one-half months after his diagnosis, Hellquist died from mesothelioma. Like Goodyear, his personal representative brings her claim against GM for the benefit of his surviving heirs.

Petitioners, like thousands of other railroad employees, contend that GM's affirmative decision to use asbestos materials in its locomotives exposed railroad employees to hazardous and toxic work environments. Although GM, as a locomotive manufacturer, ceased using asbestos in 1984 and adopted policies prohibiting its future use due to its toxicity, workers had already been exposed to dangerous levels of

ambient asbestos fibers which latently would cause respiratory disease, and in many cases, death.

Congress, in an exercise of its authority to regulate interstate commerce (see U.S.Const ., art I, Sect.8, cl.3), enacted the BIA in 1911 to provide increased protection to railroad employees and the traveling public. *Urie v. Thompson*, 337 U.S. 163, 190-191 (1949); see also, e.g., *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 542 (1994); *King v. Southern Pac. Transp. Co.*, 855 F.2d 1485, 1488, fn.1 (1988).

Even though the use of asbestos has never been a federally-regulated subject matter in the field of locomotive manufacturing, nor a subject matter specifically enunciated within the four corners of the BIA, GM moved for summary judgment on the ground that the state tort claims filed against it were preempted by the BIA.

In response to GM's summary judgment motion in the San Francisco Superior Court, petitioners asserted that Congress did not intend the BIA to preempt state law tort claims. Petitioners maintained that preemption could not be intended here because the BIA does not contain any language excluding a railroad worker's right to sue a locomotive manufacturer for injuries caused by its defective product. Another fact petitioners raised below was that no strict products liability law had been developed in 1911 when the BIA was enacted. Nonetheless, on August 30, 1996, the Superior Court granted summary judgment in GM's favor on the single ground that petitioner's claims were federally preempted by the BIA. (Appendix 69a).

The California State Court of Appeal, First District, Division Two, affirmed. (Appendix 27a). In its published decision, the court held that the BIA preempted petitioners' state law tort claims against GM. The court's decision expressly repudiated another state appellate court decision, *Viad Corp. v. Superior Court* (2d Dist., 1997) 55 Cal.App. 4th 330, which found that the BIA did not preempt personal

injury state law tort claims for asbestos-caused disease. Unlike the First District's opinion affirmed here by the California Supreme Court, *Viad* found that ***preemption was improper***, reasoning that *Napier v. Atlantic Coast Line* 272 U.S. 605 (1926) no longer controlled based on this Court's decisions in *Medtronic, Inc. v. Lohr*, 518 U.S. 4708 (1996) and *Silkwood v. Kerr-McGee Corp.* 464 U.S. 238 (1984). In *Viad*, the court observed that the scope of preemption articulated in *Napier* was uncertain, given the ***historical period*** in which it was issued and the intervening decisions by this Court addressing the same fundamental preemption question. *Viad v. Superior Court*, 55 Cal.App.4th 338 (1997). Thus, the *Viad* court determined it would be incorrect to presume that the field broadly and generically discussed in *Napier* necessarily included state law tort claims against locomotive manufacturers, particularly when those causes of action did not exist.

After rehearing in the State Court of Appeal was granted, the Court affirmed its decision. (Appendix 1a). Petitioners requested review by the California Supreme Court, which was denied on April 12, 2000. (Appendix 79a).

Over strong dissent by Justice Mosk, the California Supreme Court upheld the preemptive analysis of the State Court of Appeal, finding that *Napier* continues to articulate the preemptive scope of the BIA and forecloses state law tort claims against any locomotive manufacturer. Petitioners do not disagree that *Napier* holds that the BIA was intended to occupy the field of regulating locomotive equipment used in interstate commerce. But as Justice Mosk expresses, and Petitioners concur, *Napier* does not extend to the state law tort claims at issue here because the subject matter has never been regulated. "There has never been any form of federal regulation on the issue of asbestos use in locomotives that would contravene plaintiffs' theory of recovery, nor is it plausible that any other state will require trains to install defective asbestos insulation on locomotives." *Scheiding*, 22 Cal.4th at 489 (2000) (Mosk, J., dissenting). (Appendix 23a).

Significantly, while contemporaneously relying on *Napier* to support its decision, the California Supreme Court ultimately decided --in stark contrast to other state courts of last resort-- a question that *Napier* simply does not answer: Whether the BIA preempts state tort actions for injuries caused by a defective product used in the manufacture of locomotives. In *Napier*, this Court struck down Georgia and Wisconsin regulatory statutes which prescribed mandatory equipment on locomotives operated within those states. This Court held such state regulations were prohibited because it was within the exclusive power of the Interstate Commerce Commission to specify equipment required on locomotives. The states could not legislate additional requirements, this Court concluded, because Congress intended to occupy the field. *Id.* at pp. 607, 613.

Therefore, nowhere did this Court in *Napier* hold, or infer, that the BIA foreclosed state law tort remedies for injuries resulting from defective products already installed on locomotives. The decision neither addressed nor envisioned whether the BIA preempted state law tort remedies, particularly actions brought under a strict products liability theory, which did not exist until nearly 35 years later. "It is apparent, however, that Congress could not have assumed or intended that the BIA would preempt...claims involving health and safety by railroad employees against manufacturers because such claims did not exist in 1911; a railroad employee had no right of action against a manufacturer under the then-prevailing strict [products liability] doctrine. Indeed, the doctrine of strict products liability was not established until the 1960's." *Scheiding v. GM*, 22 Cal.4th 471(2000) (Mosk, J., dissenting). (Appendix 20a).

The impact of the California Supreme Court's error is expressed in Justice Mosk's dissent, consistent with fundamental legal principles of the United States Constitution:

> "Under the majority's result, employees... are entitled to no remedy against a manufacturer for

> their injuries... This is so even when, as here, the state damage actions do not conflict with any federal regulation or with the goals of the BIA. I doubt such absolute immunity for manufacturers is consistent with the congressional intent underlying the BIA, which was enacted to *increase* safety for workers and passengers on our nation's railroads." *Scheiding v. General Motors Corp.*, 22 Cal. 4th 471 (2000) (Mosk, J., dissenting). (Appendix 17a).
>
> (emphasis in original text).
>
> "Unlike the majority, I doubt that promoting national uniformity--as opposed to safety-- was the primary purpose of the BIA. But even if it were, I do not agree that regulatory uniformity willbe impaired unless we insulate General Motors from damagesfor injuries caused by its defective products. The majority raisesa false specter of railroads having to change equipment at state lines. As discussed, there has never been any form of federal regulation on the issue of asbestos use in locomotives..." *Scheiding v. General Motors*, 22 Cal.4th 471 (2000) (Mosk, J., dissenting). (Appendix 23a).

The California Supreme Court has hence concluded that thousands of railroad employees, their survivors, as well as passengers and bystanders, are not entitled to any remedy against locomotive manufacturers for injuries --including death-- caused by flaws in design or manufacture, "no matter how egregious." *Id.* Although the subject matter here --the use of asbestos by locomotive manufacturers-- has never been federally regulated, the Court incorrectly reasoned that imposing tort liability on railroad manufacturers for their defective product would "impair nationwide uniformity essential to the regulation of railroads," *Id.*, and therefore petitioners' claims are pre-empted.

REASONS FOR GRANTING THE PETITION

When Congress enacted the Boiler Inspection Act in 1911, it imposed on interstate railroads an absolute duty to provide safe equipment, but remains to the present time silent on the subject matter of asbestos. Additionally, neither the Federal Railroad Association ("FRA") nor any other federal agency has implemented any regulation concerning the use of asbestos in the manufacture of locomotives.

The BIA does not contain an express preemptive provision, but leaves the application of its preemptive scope to state and federal district courts. The California Supreme Court's preemptive decision here conflicts with the rulings of at least five state courts of last resort which find that the BIA does not preempt state actions involving subject matter that is not federally regulated. This decision continues the split of authority between state courts of last resort and federal circuit courts of appeals which conversely hold that the BIA's preemption of state claims, regulations and orders is proper.

The Court's ruling also demonstrates and increases the confusion created in 1926 by this Court's decision in *Napier,* concerning the scope of the BIA's preemptive effect on subject matter which is not federally regulated.

Finally, the decision below incorrectly answers a compelling federal question that has not been, but should be, decided by this Court: whether Congress intended the BIA to preempt state law tort claims. If this question is answered affirmatively, the result "will unfairly impair the ability of former railroad employees and their families to seek an adequate remedy for their asbestos-related injuries." *Scheiding v. General Motors*, 22 Cal.4th 471 (2000) (Mosk, J. dissenting). (Appendix 24a).

This Court should grant review to resolve the conflict among federal circuit courts of appeals and state courts of last resort, eliminate the confusion created by *Napier* concerning the preemptive scope of the BIA, and decide whether Congress intended the BIA to exempt state tort claims

concerning a subject matter which was not then, nor has ever been, federally regulated. The decision of the court below injects an unacceptable degree of uncertainty into the breadth of the BIA's preemptive effect. Petitioners therefore petition this Court for a Writ of Certiorari to resolve this conflict in the interpretation of important federal law.

I. The Decision Below Conflicts With the Decisions of at Least Five State Courts of Last Resort, Thereby Continuing the Split of Authority Between Federal and State Courts, Which Only This Court Can Resolve.

The California Supreme Court's decision increases the ongoing conflict between federal circuit courts of appeals and state courts of last resort over the BIA's preemptive effect with respect to state tort law claims for asbestos-related injuries to railroad workers and their survivors. This Court is the only power which can resolve this dissension. If this Court will not intervene, the conflict will continue, with the likely result that thousands of railroad workers will have no remedy for their injuries against manufacturers of defective locomotives.

To date, five federal circuit courts of appeals have held that the BIA controls. However, in each of these cases, unlike the instant case, the preempted subject matter was expressly regulated, and came within the scope of the BIA:

- In *Oglesby v. Delaware Hudson Railway Co.*, 180 F.3d 458, 461 (1999), the railroad employee's state common-law suit alleged personal injury caused by a defectively-designed and constructed cab seat. The Second Circuit found "That such a seat is within the scope of the BIA is obvious. Indeed, the Secretary of Transportation ***has issued a regulation dealing with cab seats***." *Id.* (emphasis added).

- Both *Springston v. Consolidated Rail Corp*, 130 F.3d 241 (1997) and *Marshall v. Burlington Northern, Inc.*, 720 F.2d 1149 (1983) were cases involving train

and passenger vehicle collisions. In both instances, the equipment at issue was reflective material and oscillating, strobe, ditch or head lights. As the Court in *Springston* noted, that equipment had been the subject of regulation and therefore properly subject to preemption. See *Springston v. Consolidated Rail Corp*, 130 F.3d 241, 244 (1997).

- The Fifth Circuit Court in *Missouri Pacific R.R. v. Railroad Com. of Texas*, 850 F.2d 264 (1988) found that the Railroad Commission of Texas' attempts at mandating state regulations on locomotive cabooses, were satisfactory demonstrations of a state involvement of a federally-regulated area, therefore state claims made concerning that subject matter were appropriately preempted under the BIA.

- *Consolidated Rail Corp. v. Pennsylvania Pub. Utility*, 536 F. Supp.653 (1982), affd. *sub nom.: Pennsylvania Public Utility Com. v. Consolidated Rail Corp*, 461 U.S. 912 (1983) involved a Pennsylvania state statute regulating speed recorders and indicators on locomotives. The Court in that instance found BIA preempted the state law, because that equipment was the subject of federal regulations.

None of these federal circuit court cases which the California Supreme Court relies on for justifying its decision are analogous to petitioners' case. As demonstrated, these preemption decisions involved various locomotive equipment that were the subject of established regulation, an element of federal preemption wholly absent here.

The California Supreme Court's decision is contrary to the holdings of at least five state courts of last resort, which find that the BIA does not preempt state tort claims, orders or actions.

- *Jack Henry v. District Court of the 17th Judicial District*, 198 Mont.8, 645 P.2d 1350 (1982): The Supreme Court of Montana, when faced with the

issue of whether federal legislation has preempted the state from imposing a common-law duty on railroad carriers to have additional warning devices, the court found because there was no enactment regulating warning systems, Congress did not intend the preemption of a state law tort claim. *Henry v. District Court,* 198 Mont.12 (1982).

- *Penn. Central Co. v. Dept. of Public Utilities*, 356 Mass. 478, 253 N.E.2d 339 (1969): Addressing a similar question concerning whether the BIA preempted a subject matter not regulated -- emergency lighting and tools-- the Supreme Court of Massachusetts held that the BIA did not preclude a subject matter from the state's control if there was no federal regulation of the subject.

- *Norfolk and Western Railway Company v. Pennsylvania Public Utility Comm.*, 489 Pa.109, 413 A.2d 1037 (1980): The Pennsylvania Supreme Court, in resolving whether the state's right to govern flush-type toilets on locomotives was preempted by the BIA, the court found that absent a federal regulation covering the "same subject matter" the BIA did not preempt the state order.

- *State of Washington v. Chicago, Milwaukee, St. Paul and Pacific Railroad Company*, 79 Wash.2d 288, 484 P.2d 1146 (1971): Dealing with spark-arresters on locomotives, the Supreme Court of Washington concluded that, "absent promulgation of federal administrative regulations relating to spark arresters, the BIA does not pre-empt the power of individual states to require such devices."" *State of Washington,* 79 Wash.2d 291 (1971).

Hence, there is a clear split between federal circuit courts of appeals and state courts of last resort regarding the narrow and distinct question this case presents: Whether a locomotive manufacturer may be sued under a state law tort theory for

injuries caused by its defective product, or does the BIA preempt the state law tort remedy in the absence of federal regulation concerning the subject matter?

II. *Scheiding v. General Motors* Conflicts With This Court'sPresumption Against Preemption

This Court, through *Cipollone v. Ligget Group, Inc.*, 505 U.S. 504 (1992) and its progeny, has established a common-sense framework concerning the law and scope of federal preemption:

> Consideration of issues arising under the Supremacy Clause 'start[s] with the assumption that the historic police powers of the States [are] not to be superseded by... [a] Federal Act unless that [is] the clear and manifest purpose of Congress.' [citation]... In the absence of an express congressional command, state law is preempted if that law actually conflicts with federal law, or if federal law so thoroughly occupies a legislative field 'as to make reasonable the inference that Congress left no room for the States to supplement it." *Cipollone v. Ligett Group, Inc.*, 505 U.S. 504, 516 (1992).

This Court stated in *CSX Transp., Inc. v. Easterwood*, 507 U.S. 568, 668 (1993) that there is a "presumption against pre-emption." "In the interest of avoiding unintended encroachment on the authority of the States...a court interpreting a federal statute pertaining to a subject traditionally governed by state law will be reluctant to find pre-emption." *CSX Transp., Inc. v. Easterwood,* 507 U.S. 663-664 (1993).

The California Supreme Court failed to apply the caution and "presumption against pre-emption" which this Court advances in support of a policy to avoid invading traditional areas of state authority.

III. The Decision Below Defies Basic Principles of Federal Preemption

The *sine qua non* of all preemptive challenges to state tort law is the existence of a defendant where the product at issue is a regulated or federally-controlled subject matter. (See, e.g., *Silkwood Kerr McGee Corp.*, 464 U.S. 238 (1984), where defendant Kerr McGee was regulated by the Atomic Energy Act; *Medtronic, Inc. v. Lohr*, 518 U.S. 4708 (1996), defendant Medtronic under purview of the Food & Drug Act; *Cipollone v. Ligget Group, Inc.*, 505 U.S. 504 (1992), defendant Ligget governed by the Federal Cigarette Labeling and Advertising Act.). Here, neither the BIA nor the FRA have ever regulated the subject matter -- the use of asbestos on locomotives-- nor are likely to do so.

The BIA preempts state laws, regulation and requirements which conflict with any regulation prescribed under 49 U.S.C. §20701 et seq. However, there is no conflicting regulation concerning asbestos use in locomotives to give rise to federal preemption. The Federal Railroad Administration ('FRA') stated in September 1996:

> "The use of asbestos in locomotive production was terminated many years ago, and both primary manufacturers currently have policy statements prohibiting the use of asbestos in locomotive construction. Based on the above, FRA does not feel that further action with respect to the presence of asbestos in locomotive cabs is warranted at this time."

Office of Safety Assurance and Compliance, Rep. To Cong., *Locomotive Crashworthiness and Cab Working Conditions*, p. 10-12 (Sept. 1996).

The FRA has essentially and effectively adopted this recommendation to take *no regulatory action.* In fact, the "use of asbestos in locomotives has never been and apparently will never be regulated." *Scheiding v. General Motors*, 22 Cal.4th 471, 489 (2000) (Mosk, J., dissenting). Because it

does not regulate the subject matter, this mere internal adoption by the FRA of a recommendation made by its Office of Safety Assurance cannot have any preemptive effect under either the BIA or the requirements of the Administrative Procedures Act ("APA"), 5 U.S.C. §§551-559.

The APA applies to all "substantive rules" having "substantive legal effect." See *FLRA v. U.S. Dept. Of Navy*, 966 F.2d 747, 762 (3rd Cir. 1992). The FRA never began, much less completed, a formal regulatory process concerning the use of asbestos in locomotives under the APA: There was no notice of any proposed rulemaking published in the Federal Register as required by 5 U.S.C. §553(b), nor was there any publication of a rule banning asbestos use, as mandated as part of the regulatory scheme in 5 U.S.C. §553(d).

The mere internal adoption of a recommendation to take no action therefore fails to meet the express requirements of federal preemption. Simply, asbestos-injury state law claims related to railroad manufacturers for which there is no regulation cannot be preempted by federal law. Where there is no federal regulation of the subject matter, preemption cannot apply.

This year, while finding preemption under the Federal Railroad Safety Act (FRSA) in *Norfolk Southern Railway Company v. Shanklin*, 120 S.Ct.1467 (2000), this Court held that to preempt state law, a federal regulation *must* cover the same subject matter, and not merely touch upon or relate to that subject matter. Here, as discussed, there is no regulation of the offending subject matter at issue.

On a different but importantly related issue, Justice Ginsburg, joined by Justice Stevens, dissented to this Court's majority in *Norfolk*. Justice Ginsburg's dissent mirrors the reasoning of Justice Mosk's dissent in the underlying decision and is equally applicable here:

> The upshot of the Court's decision is that state negligence law is displaced with no substantive

> federal standard of conduct to fill the void. That outcome defies common sense and sound policy.

Norfolk Southern Railway Company v. Shanklin, 120 S.Ct. 1467, 1477 (2000) (Ginsburg, J., dissenting).

Likewise reflecting on this Court's 1993 decision, Justice Ginsburg's dissent continues: "As persuasively explained... our prior decision in *CSX Transportation Inc. v. Easterwood*, 507 U.S. 658 (1993), does not necessitate the ouster of state law the Court now commands." Neither should the lower court's decision here necessitate the ouster of state law claims calling for just compensation for asbestos-related injuries otherwise available under state law.

A. Neither Napier Nor The Language Of The BIA Indicates No Clear Or Express Intent To Preempt State Tort Actions

Preemption being presumptively disfavored, "the first stone we turn in evaluating Congress's intent to preempt . . . is the language of the statute." *Law v. General Motors Corp.*, 114 F.3d 334 (1997). Imposing an absolute duty to provide safe locomotive equipment, the Congressional intent did not expressly, or impliedly, extended to state tort claims.

As federal preemption "fundamentally is a question of Congressional intent," *English v. General Electric Co.*, 496 U.S. 72, 78-79 (1990), unless that intent is expressly manifest, preemption cannot be presumed. "The intention of Congress to exclude states from exerting their police power must be clearly manifested." *Napier v. Atlantic Coast Line R. Co.*, 272 U.S. 605, 611 (1926). Here, there is no manifested intent that the BIA should preempt state law tort claims of railroad workers and their families based on exposures to toxic substances. A finding of federal preemption in this case would blanket a manufacturer, whose defective products caused grave occupational injury, with immunity from liability, and is contrary to all legal principles and authority.

IV. Tort Liability Against Railroad Manufacturers Does Not Reasonably Occupy The Field Of The BIA

As enacted in February 1911, and as amended thereafter, the BIA on its face applies simply to railroad carriers. The Act is markedly silent concerning railroad manufacturers. The identifying phrase "railroad carriers" appears repeatedly. *See*, e.g., 49 U.S.C. §20701("*railroad carrier*" is required to use inspected safe equipment); 49 U.S.C. §20702 (Secretary of Transportation must ensure that every "*railroad carrier*"inspect its equipment); 49 U.S.C. §20703 (accident reporting requirements for "*railroad carrier*"). The plain language of the federal statute is mute concerning railroad manufacturers such as GM.

Likewise, the legislative history of this statute strongly suggests that Congress intended the BIA to apply to carriers only. Congress enacted the statute as an amendment to the Federal Employers' Liability Act ('FELA') 45 U.S.C. §51, et seq., to provide and exclusive remedy for injured railroad employees against *railroad carriers*. See *Urie v. Thompson*, 337 U.S. 163, 188-191 (1949); see also *Viad Corp. v. Superior Court*, 55 Cal.App.4th 330, 334 (1997); *see*, e.g., *Law v. General Motors Corp.* (9th Cir. 1997) 114 F.3d 908, 910.

The exclusion of "sellers" or "manufacturers" from the ambit of the BIA signifies Congress' intent to apply the statute only to railroad carriers. Put in other mirrored terms, Congress omitted that language because it never intended to provide "non-railroads" such as GM with preemptive immunity from liability damages caused by their defective products.

Further evidencing this intent, a federal district court of Pennsylvania explains:

> It is clear that the BIA as a whole establishes a regulatory framework within which carriers and the Secretary of Transportation --*but not railroad manufacturers*-- operate. Nothing about the

> structure of the BIA indicates that Congress intended to bring railroad manufacturers within its regulatory web, ***let alone to preclude state common law actions against railroad manufacturers.***"

Lorincie v. Southeastern Pennsylvania Transp. Auth., 34 F. Supp.2d 929, 934 (E.D.Pa. 1998). (emphasis added). The *Lorincie* Court further states, in stark contrast to the decision below, that it "decline[s] to stretch *Napier*'s common-sense interpretation of the BIA into one that has rather less common sense. The statute's text does not mention railroad manufacturers, its structure does not invite reading them into it, and federalism and history counsel leaving them out." *Lorinicie, supra*, 34 F.Supp.2d 929, 934.

V. The Decision Below Fails to Acknowledge That The Relief Petitioners Seek Did Not Exist When the BIA Was Enacted

When the BIA was enacted, claims under a strict products liability doctrine did not exist. Congress could not therefore have reasonably intended or assumed that such state law tort claims for damages involving injury and disease caused by defective products would be subsumed under the preemptive arm of the BIA. Indeed, the doctrine of strict products liability was not established until the early 1960's. See *Greenman v. Yuba Power Products, Inc.*, 59 Cal.2d 57 (1963); see also *Vandermark v. Ford Motor Co.*, 61 Cal.2d 256 (1964). Railroad employees and their families could not have obtained such a state law remedy for their injuries at the time the BIA was enacted because the remedy simply had not been developed.

Moreover, the hazardous and potentially fatal effects of asbestos-exposure were not commonly known in 1911. The first suspected dangers of asbestos exposure were published in England in 1927, sixteen years after Congress enacted the BIA. A full 55 years after the BIA was enacted, the first personal injury-asbestos lawsuit based on a theory of strict products liability was filed. (*Tomplait v. Combustion*

Engineering, U.S. District Court, Eastern Division of Texas, Civil Action No. 5402 (1966)). However, the first known published opinion stating judicial outrage at the misconduct of the asbestos industry wasn't until 1968, in *Borel v. Fibreboard*, 493 F2d 1076 (1968).

This brief historical account concerning asbestos, the common knowledge of its hazards, and occupational asbestos-disease is relevant to the enactment of the BIA. In 1911, Congress could not have anticipated that then-widespread use of asbestos-containing materials on locomotives posed a safety or health risk to railroad employees. Any proposition therefore that Congress intended the BIA to preempt state law tort claims for asbestos-related injury is dubious at best.

CONCLUSION

The California Supreme Court's decision below continues an unresolved conflict between federal circuit courts of appeals and state courts of last resort. The preemptive scope of the Boiler Inspection Act over state law tort claims is an issue that has created, and perpetuated, confusion since this Court's decision in *Napier*. This Court is the only authority that can end the division and replace it with reasoned unity.

In this case, the state court of last resort in California has issued an opinion that would give preemptive effect to the BIA and eliminate all state law tort claims of thousands of injured railroad workers and their survivors. This result immunizes manufacturers, such as General Motors, who used defective asbestos material in their locomotives, from liability for damages their product caused. The state tort law remedies sought by petitioners here pose no threat to any federal objectives under the BIA. The California Supreme Court's decision is not in accordance with United States Supreme Court authority cited herein, nor is it consistent with the language used by Congress in enacting the BIA, which neither contained any express preemptive provisions nor regulated the subject matter here.

For all the foregoing reasons, Petitioners assert that the California Supreme Court decision is in conflict with United States Supreme Court precedent, and raises questions of fundamental, constitutional and exceptional federal importance. The grant of certiorari is therefore warranted so this Court can further define the boundaries of the BIA. Petitioners respectfully request that their Petition for Writ of Certiorari be granted.

Respectfully submitted,

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Filed 3/9/00

IN THE SUPREME COURT OF CALIFORNIA

S073 196
Ct. App. 1/2 No. A076324

ROBERT SCHEIDING et al.,
Plaintiffs and Appellants,

v.

GENERAL MOTORS CORPORATION,
Defendant and Respondent.

San Francisco County
Super. Ct. Nos. 964534, 964765
964349, 957535, 964764
(Consolidated)

[And four other cases.]*

Almost 75 years ago, the United States Supreme Court held that the Locomotive Boiler Inspection Act (BIA or Act), now codified at 49 United States Code section 20701 et seq., "extends to the design, the construction, and the material of every part of the locomotive and tender and of all appurtenances." *(Napier v. Atlantic Coast Line* (1926) 272 U.S. 605, 611 *(Napier).)* Since Congress intended the Act to occupy this field, "requirements by the states are precluded, however commendable or however different their purpose. [Citations.]" (272 U.S. at p. 613.)

* *Hellquist v. General Motors Corporation* (No. A076333); *Blackburn v. General Motors Corporation* (No. A07634 1); *Goodyear v. General Motors Corporation* (No. A0763 52); *Umphriss v. General Motors Corporation* (No. A076730).

We conclude *Napier* continues to articulate the preemptive scope of the BIA and thus forecloses state law causes of action against locomotive manufacturers for defective design of their product. Accordingly, we affirm the judgment of the Court of Appeal in favor of defendant.

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs are former railroad employees, their spouses, and their survivors, who brought suit against defendant General Motors Corporation (defendant) for asbestos-related injuries.[1]* Until 1984, defendant, through its electro-motive division, manufactured diesel locomotives containing asbestos materials. The trial court granted judgment on the pleadings and summary judgment on the grounds the BIA preempted plaintiffs' strict product liability and other state common law claims.

Relying on *Napier, supra,* 272 U.S. *605,* the Court of Appeal affirmed. It expressly disagreed with the contrary decision in *Viad Corp. v. Superior Court* (1997) *55* Cal. App.4th 330 *(Viad),* in which the Court of Appeal held that the federal preemption analysis in *Medtronic, Inc. v. Lohr*

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[1] As the Court of Appeal detailed: "Harry Goodyear, Victor Hellquist, Robert Scheiding, Gaylord Blackburn and Billy Umphriss worked in or around locomotives at some time between the 1940's and the 1980's. Plaintiffs in each of these five actions alleged below that [defendant's] locomotives and related equipment were defective because they released asbestos fibers into the atmosphere where these railroad employees worked and onto their clothing. *Goodyear* and *Hellquist* are wrongful death and survival lawsuits brought by the spouses of workers who died as a result of asbestos illnesses. *Scheiding, Blackburn* and *Umphriss* were filed by the injured employees themselves. [Fn. omitted.] The complaints in each case allege against [defendant] causes of action for negligence, strict liability, and false representation, as well as wrongful death and survival in *Goodyear* and *Hellquist* and negligent infliction of emotional distress and loss of consortium in *Scheiding, Blackburn* and *Umphriss.* [Fn. omitted.]"

(1996) 518 U.S. 470 *(Medtronic)* and *Silkwood v. Kerr-McGee Corp.* (1984) 464 U.S. 238 *(Silkwood)* had undermined the viability of *Napier.* We granted review to resolve this conflict in the law.

II. DISCUSSION

"It has long been settled that Congress intended federal law to occupy the field of locomotive equipment and safety, particularly as it relates to injuries suffered by railroad workers in the course of their employment." *(Law v. General Motors Corp.* (9th Cir. 1997) 114 F.3d 908, 910 *(Law).)*

Napier, supra, 272 U.S. 605, is the genesis of this settled law. *Napier* involved a Georgia statute that prescribed an automatic door to the locomotive firebox and a Wisconsin statute that required a locomotive cab curtain. Invoking the BIA, interstate carriers brought suit to enjoin enforcement of these laws, which prohibited use within each state of locomotives not equipped with the specified devices. The question presented was "whether the Boiler Inspection Act has occupied the field of regulating locomotive equipment used on a highway of interstate commerce, so as to preclude state legislation." (272 U.S. at p. 607.)

The Supreme Court noted that as originally enacted in 1911, the BIA applied only to the boiler. *(Napier, supra,* 272 U.S. at p. 608.) In 1915, however, it was extended "to 'include the entire locomotive and tender and all parts and appurtenances thereof.'" *(Ibid.)* At the same time, Congress conferred upon the Interstate Commerce Commission (Commission) the responsibility and authority for promulgating rules and regulation to implement the Act (see 272 U.S. at pp. 608-609), authority now exercised by the Secretary of Transportation. Although the Commission had the power to designate requirements for locomotives, "it ha[d] made no order requiring either a particular type of fire box door or a cab curtain. Nor ha[d] Congress legislated specifically in respect to either device." *(Id.* at p. 609.)

The court acknowledged that "[e]ach device was prescribed by the state primarily to promote the health and comfort of engineers and firemen" and was therefore "a proper exercise of its police power . . . ." *(Napier, supra,* 272 U.S. at p. 610.) Nevertheless, the requirements came within the scope of authority delegated to the Commission, i.e., regulation of "the equipment of locomotives." *(Id.* at p. 612.) "The fact that the Commission has not seen fit to exercise its authority to the full extent conferred [by regulating fire box doors or cab curtains], has no bearing upon the construction of the act delegating the power." Since Congress "intended to occupy the field" of locomotive equipment *(id.* at p. 613), the standard set by the Commission must displace all state requirements notwithstanding a lack of conflict between that standard and state law. *(Ibid.;* cf. *Southern Ry. Co. v. Lunsford* (1936) 297 U.S. 398, 402 [no liability under the BIA for failure to perform if locomotive part is not "definitely prescribed by lawful order" of the Commission].)

The Ninth Circuit Court of Appeals recently explained the practical rationale for this determination: "This broad preemptive sweep is necessary to maintain uniformity of railroad operating standards across state lines. Locomotives are designed to travel long distances, with most railroad routes wending through interstate commerce. The virtue of uniform national regulation 'is self-evident: locomotive companies need only concern themselves with one set of equipment regulations and need not be prepared to remove or add equipment as they travel from state to state.' [Citations.]" *(Law, supra,* 114 F.3d at p.910.) Moreover, "[a]part from compensating victims of accidents for their injuries, the purpose of tort liability is to induce defendants to conform their conduct to a standard of care established by the state. [Citation.] A railroad equipment manufacturer found to have negligently designed a braking system, for example, is expected to modify that system to reduce the risk of injury. If the manufacturer fails to mend its ways, its negligence may be adjudged willful in the next case, prompting a substantial punitive damages award. If each state were to adopt different

liability-triggering standards, manufacturers would have to sell locomotives and cars whose equipment could be changed as they crossed state lines, or adhere to the standard set by the most stringent state. Either way, Congress's goal of uniform, federal railroad regulation would be undermined. [Citation.]" *(Id.* at pp.910-911; cf. *Carrillo v. ACE Industries, Inc.* (1999)20 Cal.4th 1158, 1168-1169 *(Carrillo)* [finding same rationale applies under the federal Safety Appliance Acts (49 U.S.C. § 20301 et seq.)].)

We agree with the Court of Appeal that the foregoing principles govern the viability of plaintiffs' state law causes of action, which are based upon their claim defendant manufactured a defective product by utilizing asbestos in the design of its locomotives. As the court explained: "There is no doubt that the Secretary of Transportation has authority to regulate the design of the locomotive and could order the elimination of asbestos in locomotive components.[2]*12 Imposing tort liability on railroad locomotive manufacturers clearly would affect' "the design, the construction, and the material" of locomotives.' *([Law, supra,* 114 F.3d at p. 911, quoting *Napier, supra* . 272 U.S. at p. 611.]) This effect on

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[2] It appears the Federal Railroad Administration (FRA) has, in fact, addressed the question of asbestos in locomotives. In a 1996 report to Congress, the FRA noted that the two primary builders, one being defendant, had 10 years earlier ceased to use friable asbestos and were "careful to avoid the use of asbestos in new and rebuilt locomotives." (FRA, U.S. Dept. of Transportation, Rep. to Congress, Locomotive Crashworthiness and Cab Working Conditions (Sept. 1996) p. 12-9.) Moreover, the FRA "could find no evidence of asbestos being a health problem for crews of older locomotives." *(Ibid.)* It determined that final regulations to protect workers from exposure to asbestos published by the Occupational Safety and Health Administration were sufficient to "ensure effective long-term management of asbestos." *(Id.* at p. 10-11.) Accordingly, it "recommend[ed] no action be taken on the issue of asbestos in locomotives, except to the extent any new information requires that the issue be reopened." *(Id.* at p. 12-9.) We grant the parties' request to take judicial notice of these portions of the FRA's report. (See Evid. Code, § 452, subd. (c).)

interstate commerce would be both 'direct and substantial.' *(English v. General Electric Co.* [(1990)] 496 U.S. [72,] *85 [(English)].)* As *Law* explains, the imposition of tort liability on railroad equipment manufacturers would force them to conform to design and construction standards imposed by the states. 'This would transfer the regulatory locus from the Secretary of Transportation to the state courts—a result the BIA was clearly intended to foreclose. [Citation.]' *(Law, supra,* at pp.911-912, fn. omitted.)"

This conclusion follows numerous state and lower federal court decisions that have found the BIA preempts state tort damage actions.[3] We find this consensus further indication that *Napier, supra,* 272 U.S. 605, remains the controlling and dispositive authority on the preemptive scope of the BIA.

The United States Supreme Court has, moreover, impliedly affirmed that *Napier* remains viable. In *Consolidated Rail Corp. v. Pennsylvania Pub. Utility, supra,* 536 F.Supp. 653 *(Consolidated Rail),* the plaintiff railroad challenged a Pennsylvania statute that required locomotives to have speed recorders and indicators, contending the BIA preempted this state regulation. The state countered that when Congress enacted the Federal Railroad Safety Act (49 U.S.C. § 20101 et seq.), it "redistributed railroad regulatory authority so that the total-preemption test of the [BIA] is no longer valid." *(Consolidated Rail, supra,* 536 F.Supp. at p. *654.)* The

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[3] E.g., *Oglesby v. Delaware & Hudson Railway Co.* (2d Cir. 1999) 180 F.3d 458, 460-462; *Springston v. Consolidated Rail Corp.* (6th Cir. 1997) 130 F.3d 241, 244-245; *Missouri Pacific R.R. v. Railroad Com. of Texas* (5th Cir. 1988) 850 F.2d 264, 268; *Marshall v. Burlington Northern, Inc.* (9th Cir. 1983) 720 F.2d 1149, 1151-1152; *Consolidated Rail Corp. v. Pennsylvania Pub. Utility* (E.D.Pa. 1982) 536 F.Supp. 653, affd. (3d Cir. 1982) 696 F.2d 981, affd. *sub nom. Pennsylvania Public Utility Corn. v. Consolidated Rail Corp.* (1983) 461 U.S. 912; *Key v. Norfolk Southern Ry. Co.* (Ga.Ct.App. 1997) 491 S.E.2d 511; *In re Train Collision at Gary, Indiana* (Ind.Ct.App. 1996) 670 N.E.2d 902, 910-911; *Carter v. Consol. Rail Corp.* (OhioCt.App. 1998) 709 N.E.2d 1235.

district court rejected the state's argument and found *Napier* controlling. *(Id.* at pp. *655-657.)* Although Congress could have repealed or recodified the BIA, instead it "concluded that [the Act] was working well, and specifically determined to keep it independently in force 'without change.' (536 F.Supp. at p. 656, Ih. omitted.) "If the Railroad Safety Act were to change the preemption test for those areas [already governed by the BIA], the states could expand their regulatory authority, allowing a new reservoir of differing, and possibly incompatible, railroad-safety law. This would run counter to Congress's purpose of uniform national regulation. It is contrary to Congress's purpose in passing the Railroad Safety Act to allow the states to reoccupy fields from which they previously had been displaced." *(Id.* at pp.656-657, fns. omitted.)

On appeal, the Supreme Court summarily affirmed. *(Pennsylvania Public Utility Com. v. Consolidated Rail Corp., supra,* 461 U.S. 912.) Such summary actions "should . . . be understood as . . . applying principles established by prior decisions to the particular facts involved." *(Mandel v. Bradley* (1977) 432 U.S. 173, 176.) We thus have strong, if indirect, evidence *Napier* continues to control with respect to the scope of BIA preemption.

We also have evidence of legislative intent to this effect. As the court in *Consolidated Rail, supra,* 536 F.Supp. at pages 656-657, observed, when Congress enacted the Federal Railroad Safety Act in 1970, it specifically identified the BIA as among the "particular laws" governing railroad safety that "have served well," so well that the Committee on Interstate and Foreign Commerce reviewing the matter "chose to continue them without change." (H.R.Rep. No. 91-1194, 2nd Sess. (1970), reprinted in 1970 U.S. Code Cong. & Admin. News, p. 4105.) In discussing the role of the states in this area, the committee noted that "[a]t the present time where the Federal Government has authority [e.g., under the BIA], with respect to rail safety, it preempts the field." *(Id.,* 1970 U.S. Code Cong. & Admin. News at p. 4108.) Additionally, when

Congress recodified the BIA in 1994, the House Report stated "this bill makes no substantive change" and disclaimed any intent to "impair the precedent value of earlier judicial decisions . .." (H.R.Rep. No. 103-180, 1st Sess. (1993), reprinted in 1994 U.S. Code Cong. & Admin. News, p. 822; see *Finley v. United States* (1989) 490 U.S. 545, *554-555.)* In light of this explicit statement, we may "apply the presumption that Congress was aware of... earlier judicial interpretations [including *Napier]* and, in effect, adopted them. [Citations.]" *(Keene Corp. v. United States* (1993) *508* U.S. 200, 212.)

Plaintiffs take the position that in the wake of *Medtronic, supra,* 518 U.S. 470, and *Silkwood, supra,* 464 U.S. 238, preemption analysis has evolved to narrow the proper construction and application of *Napier.* We consider this argument with caution in light of the United States Supreme Court's clear admonition that "if a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals [and state courts applying federal law] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *(Rodriguez de Quijas v. Shearson/American Express, Inc.* (1989) 490 U.S. 477, 484; *Agostini v. Felton* (1997) 521 U.S. 203, 237.)

In any event, we are unpersuaded on the merits. (Cf. *Carrillo, supra,* 20 Cal.4th at pp. 1167-1169 [rejecting the same argument in considering the preemptive effect of the federal Safety Appliance Acts].) Unlike the present case, in which the United States Supreme Court has found field preemption, *Medtronic* involved an express preemption provision contained in the Medical Device Amendments of 1976 (MDA). Construing the provision according to its terms, a plurality of the court found no congressional intent to oust all state common law negligence actions.[4] "If Congress

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[4] In his concurring opinion, Justice Breyer did not disagree with this determination. *(Medtronic, supra,* 518 U.S. at pp. 503-508 (conc. opn. of

intended such a result, its failure even to hint at it is spectacularly odd, particularly since Members of both Houses were acutely aware of ongoing product liability litigation." *(Medtronic, supra,* 518 U.S. at p.491.) "Unlike the statute construed in *Cipollone [v. Liggett Group, Inc.* (1992) 505 U.S. 504], for instance, pre-emption under the MDA does not arise directly as a result of the enactment of the statute; rather, in most cases a state law will be pre-empted only to the extent that the [federal Food and Drug Administration] has promulgated a relevant federal 'requirement.' " *(Medtronic, supra,* at p. 496.) The state action was statutorily permitted because the regulatory agency had yet to impose any such requirement as to the device in question. *(Id.* at pp. 496-497.) In contrast to this permissible interplay of state and federal law, the Supreme Court has determined that the BIA occupies the field of locomotive equipment and thus any "requirements by the states are precluded, however commendable or however different their purpose. [Citations.]" *(Napier, supra,* 272 U.S. at p. 613.)

In *Silkwood, supra,* the high court found no intent to preclude an award of punitive damages under the Atomic Energy Act in light of the overall statutory scheme. (464 U.S. at pp. 250-255.) "By subsequent enactment of the Price-Anderson Act, Congress 'assumed that persons injured by nuclear accidents were free to utilize existing state tort law remedies.' Considering the historical record, '[t]his was true even though Congress was fully aware of the [Nuclear Regulatory] Commission's exclusive authority over safety matters.' [Citation.]" *(Carrillo, supra,* 20 Cal.4th at p. 1168.) By contrast, like the Safety Appliance Acts at issue in *Carrillo,* the BIA "contains no evidence Congress assumed or intended state remedies for design defects would be preserved. Given the goal of national uniformity, allowing

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Breyer, J.).) The remaining justices concluded the state common law damages actions did impose "requirements" within the meaning of the MDA and were therefore preempted. *(Medtronic,supra,* 518 U.S. atp. 509 (conc. & dis. opn. of O'Connor, J.).)

such claims would substantially impair its function." *(Carrillo, supra,* at pp. 1168-1169.)

Drawing on *Medtronic* and *Silkwood,* the Court of Appeal in *Viad, supra,* 55 Cal.App.4th 330, reached a contrary conclusion by defining the field preempted by the BIA to exclude plaintiffs' state tort actions. It noted that "when the BIA was enacted, a railroad employee would have had no right of action against the manufacturer." *(Viad, supra,* at p. 338; see *MacPherson v. Buick Motor Co.* (1916) 217 N.Y. 382 [111 N.E. 1050].) The court reasoned that since "[t]he doctrine of strict liability of a manufacturer was not established until much later" (see *Greenman v. Yuba Power Products, Inc.* (1963) 59 Cal.2d 57), Congress could not have intended to preempt such actions. *(Viad, supra,* 55 Cal.App.4th at p. 338.) But this reasoning proves too much: Equally logically, Congress could not have intended to preserve that which did not exist. Furthermore, the BIA was enacted as an amendment to the Federal Employers' Liability Act *(45* U.S.C. § 51 et seq., FELA), which significantly expanded the ability of railroad workers to seek recourse for on-the-job injuries and has been broadly interpreted. (See *Urie v. Thornpson* (1949) 337 U.S. 163, 180-191; *Viad,supra, 55* Cal.App.4th atp. 338 ["One of the primary purposes of FELA was to eliminate defenses to tort liability and to facilitate recovery. [Citation.]"].) Having enlarged the basis for recovery under federal law, Congress reasonably could have intended to restrict it under state law.

Moreover, unlike the situation in *Silkwood,* the field occupied by the BIA must necessarily extend to state law tort recovery. That is, the BIA cannot remove "the design, the construction, and the material of every part of the locomotive and tender and of all appurtenances" from the purview of state regulation *(Napier, supra,* 272 U.S. at p. 611) without concomitantly precluding tort actions premised on a defect in such design, construction, or material. Any other result would place regulation of these requirements in the hands of state juries, thereby constraining the Secretary of Transportation's

regulatory authority and undermining the goal of uniformity. *(Law, supra,* 114 F.3d at pp. 910-911; cf. *Baltimore & Ohio R. Co. v. Groeger* (1925) 266 U.S. 521, 530-531.)

In arguing that the scope of the BIA does not extend to their claims, plaintiffs also rely on *English, supra,* 496 U.S. 72. In that case, the Supreme Court held that the field preempted by federal law did not extend to a state law cause of action for intentional infliction of emotional distress arising out of actions by the plaintiff's employer allegedly taken in retaliation for her nuclear safety complaints. In reaching this conclusion, the court made clear that determining an issue of field preemption focuses not only on the purpose of the state law in question but its "actual effect" with respect to federal regulation. *(Id.* at p. 84.)

"[T]o fall within the pre-empted zone, [the state law] must have some direct and substantial [rather than remote] effect" on the regulated subject matter. *(Id.* at p. 85.) This standard does not avail plaintiffs here. We do not hesitate to conclude that allowing their state law claims would have a direct and substantial effect on the uniformity of locomotive design, construction, and material mandated by Congress through the BIA.

Plaintiffs contend our determination inverts the burden of proof on preemption, which places the onus on the defendant to establish congressional intent to eclipse state law. *(Medtronic, supra, 518* U.S. at p. 486.) Their contention assumes we write on a clean slate, but we do not. *Napier* has long established Congress "intended to occupy the field" of locomotive equipment *(Napier, supra,* 272 U.S. at p. 613), a field that extends to the "design" of such equipment. *(Id.* at p. 611.) Thus, defendant has carried its burden. To the extent plaintiffs seek to avoid the impact of *Napier* by arguing *Medtronic* and *Silkwood* have sufficiently altered the preemption landscape to warrant a different conclusion, they assume the burden of demonstrating a contrary congressional intent. Applying the analysis derived from *Carrillo,* we find they have failed to do so. *(Carrillo, supra,* 20 Cal.4th at pp. 1167-1169.) Plaintiffs cite " 'the assumption that the historic

police powers of the States [relating to matters of health and safety] were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *(Medtronic, supra,* 518 U.S. at p.485.) We question plaintiffs' premise that rail workers' health and safety are concerns primarily within the historic police powers of the States. "Railroads have been subject to comprehensive federal regulation for nearly a century . . . . There is no comparable history of longstanding state regulation.., of the railroad industry." *(Transportation Union v. Long Island R. Co.* (1982) 455 U.S. 678, 687-688, fns. omitted.) This observation applies equally to safety matters as the enactment of the BIA and the Safety Appliance Acts in the early 1900's attests. In this regard, uniformity has long been the congressional touchstone. (See, e.g., *Penna. R. R. Co. v. Pub. Service Comm.* (1919) 250 U.S. 566, 569 ["The subject-matter in this instance [rail safety appliances] is peculiarly one that calls for uniform law...."] The statutory scheme, as construed by the courts and reaffirmed by Congress, reflects that any historic state police powers must yield to this clear and manifest purpose. Moreover, the Supreme Court considered this factor in *Napier,* but nevertheless determined the BIA occupies the entire field of locomotive equipment regardless of the salutary purpose of any additional state requirement. *(Napier, supra,* 272 U.S. at pp. 610-611.)

It is also immaterial to our analysis that plaintiffs' causes of action raise no conflict with any provision of the BIA or its implementing regulations, that they will not impair nationwide uniformity, or that they are consistent with the safety purposes underlying the BIA. *(Napier, supra,* 272 U.S. at pp. 610-611; cf. *Southern Ry. Co. v. R.R. Com., Indiana* (1915) 236 U.S. 439, 448 [rejecting argument for nonpreemption based upon lack of conflict between state regulation and Safety Appliance Acts].) "[T]he power delegated to the Commission by the Boiler Inspection Act as amended is a general one. It extends to the design, the construction, and the material of every part of the locomotive and tender and of all appurtenances." *(Napier, supra,* 272

U.S. at p. 611.) Having occupied the field, Congress left no area within which states may act. In essence, these arguments conflate field preemption with conflict preemption. (Cf. *Carrillo, supra,* 20 Cal.4th at p. 1166; see also *English, supra,* 496 U.S. at p.'79, fn. *5* ["[F]ield pre-emption may be understood as a species of conflict pre-emption: A state law that falls within a pre-empted field conflicts with Congress' intent (either express or plainly implied) to exclude state regulation."])

Nor do we accord significance to the absence of any specific regulation of asbestos by the Secretary of Transportation or the FRA. (See *Napier, supra,* 272 U.S. at p. 613.) Even assuming plaintiffs' factual premise (see *ante,* fn. 2; see also 49 C.F.R. §~ 229.25(b), 229.41, 229.83, 229.89 [addressing locomotive insulation and related matters]), the particulars of the regulatory scheme are entirely within both the purview and the prerogative of the Secretary of Transportation. *(Napier, supra,* at pp.612-613.) '[T]he will of Congress upon the whole subject is as clearly established by what it had not declared, as by what it has expressed.' *(Southern Ry. Co. v. R.R. Com., Indiana, supra,* 236 U.S. at p. 447.) In effect, plaintiffs' lawsuits would have a retroactive regulatory effect by now allowing design control the BIA denied the state at the time of manufacture.

We also find no merit in plaintiffs' contention that *Napier* addresses only state legislation regulating locomotive equipment, not common law tort remedies. (See, e.g., *Napier, supra,* 272 U.S. at pp. 607, 613.) The United States Supreme Court has long rebuffed efforts to draw this artificial distinction: "Our concern is with delimiting areas of conduct which must be free from state regulation if national policy is to be left unhampered. Such regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy. Even the States' salutary effort to redress private wrongs or grant compensation for

past harm cannot be exerted to regulate activities that are potentially subject to the exclusive federal regulatory scheme." *(San Diego Unions v. Garmon* (1959) 359 U.S. 236, 246-247; see *Law, supra,* 114 F.3d at pp. 910-9 1 1.) Contrary to plaintiffs' implication, the compelling need for uniform locomotive equipment standards prevents state remedies for injured persons from coexisting with federal regulation.

We are equally unpersuaded the BIA does not apply to locomotive manufacturers. (See 49 U.S.C. § 20701 [BIA speaks expressly to "railroad carrier[s]" and not manufacturers]; but see *id.,* § 21302(a) [liability for violation of the Act applies to any "person" including manufacturers]; former 45 U.S.C. § 34, as amended by Pub.L. No. 100-342 (June 22, 1988) § 14(7)(A), 102 Stat. 633; *Viad, supra, 55* Cal.App.4th at p. 334.) "This distinction [between locomotive manufacturers and operators] is without significance. The BIA preempts any state action that would affect 'the design, the construction, and the material' of locomotives. [Citation.] Imposing tort liability on railroad equipment manufacturers would do just that, by forcing them to conform to design and construction standards imposed by the states. This would transfer the regulatory locus from the Secretary of Transportation to the state courts—a result the BJA was clearly intended to foreclose. [Citation.]" *(Law, supra,* 114 F.3d at pp. 911-912, fn. omitted; cf. *Taylor AG Industries v. Pure-Gro* (9th Cir. 1995) 54 F.3d *555,* 561, fn. 3 ["analysis focuses not on whom the legal duty is imposed, but on whether the legal duty constitutes a state law requirement" already covered by federal law].) Sanctioning state common law actions against manufacturers would raise the same concerns for impairing nationwide uniformity essential to the regulation of railroads as would sanctioning such actions against operators. *(Law, supra,* 114 F.3d at pp. 910-911; cf. *Carrillo, supra,* 20 Cal.4th at p. 1169.)[5]

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[5] Plaintiffs further contend the scope of the BIA extends only to the on-line operation of locomotives and therefore does not govern redress for their injuries, which resulted from work on the equipment in roundhouses

Finally, plaintiffs argue that even if their defective design claims fall, their failure-to-warn causes of action survive the BIA's preemptive sweep because the statute does not address warning or instruction labels. We agree with the Ninth Circuit Court of Appeals that "[a]s for warning requirements, these too are within the scope of the Secretary's authority—an authority which the Secretary has often invoked. [Citations.]" *(Law, supra,* 114 F.2d at p. 911; cf. *Carrillo, supra* .20 Cal.4th at p. 1165, fn. 1 [Safety Appliance Acts preempt failure-to-warn claims]; *Ouellette v. Union Tank Car Co.* (D.Mass. 1995) 902 F.Supp. 5, 10 [same, Federal Railroad Safety Act].) Moreover, "[t]his argument begins from an incorrect premise: the relevant inquiry is not whether a label falls under the BIA but whether [the subject of such a label] does." *(Oglesby v. Delaware & Hudson Railway Co., supra,* 180 F.3d at p. 461.) Pertinent regulations address the question of locomotive insulation (see, e.g., 49 C.F.R. §§ 229.25(b), 229.41, 229.83, 229.89), thus any failure-to-warn claims relating to that subject come within our previous analysis.

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and repair shops. (See 49 U.S.C. § 20701; see also *id.*, § 20902(a)(1) [authorizing Secretary of Transportation to investigate accidents "occurring on the railroad line"].) Plaintiffs did not submit this argument until their petition for rehearing in the Court of Appeal, and the court did not address it. Accordingly, we find it was not timely raised and will not consider it further. (Cal. Rules of Court, rule 29(b)(1).)

DISPOSITION

The judgment of the Court of Appeal is affirmed. [6]

BROWN, J.

WE CONCUR:

GEORGE, C.J.
KENNARD, J.
BAXTER, J.
WERDEGAR, J.
CHIN,J.

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[6] To the extent it is inconsistent with our analysis and holding, we disapprove *Viad, supra,* 55 Cal.App.4th 330.

DISSENTING OPINION BY MOSK, J.

I dissent.

This action involves claims by former railroad employees and their survivors against General Motors Corporation for asbestos-related injuries suffered as a result of exposure to asbestos materials in locomotives manufactured by General Motors. The majority conclude that General Motors, which until 1984 manufactured locomotives using asbestos materials for insulation, is shielded against common law damage claims by former railroad employees because such claims are preempted by the Locomotive Boiler Inspection Act (BIA or the Act), title 49 of the United States Code, section 20701 et seq.

I disagree. It is true that *Napier v. Atlantic Coast Line* (1926) 272 U.S. 605, 607, on which the majority principally rely, held that the BIA was intended to occupy the field of regulating locomotive equipment used on a highway of interstate commerce. I am not persuaded, however, that the "field" referred to in *Napier* extends to the claims at issue in this case.

Under the majority's result, employees (as well as passengers and bystanders) are entitled to no remedy against a manufacturer for their injuries caused by any flaws in its design or manufacture of a product, no matter how egregious. This is so even when, as here, the state damage actions do not conflict with any federal regulation or with the goals of the BIA. I doubt that such absolute immunity for manufacturers is consistent with the congressional intent undelying the BIA, which was enacted to *increase* safety for workers and passengers on our nation's railroads.

I

The question presented is whether the BIA preempts state common law tort claims against General Motors for injuries caused by defects in its products. Contrary to the

majority's assertion, the point is not well settled. *Napier* does not address it; nor has the United States Supreme Court addressed it in any subsequent decision. We must begin, therefore, with the assumption that preemption is disfavored and we should be reluctant to find it.

Cipollone v. Liggett Group, Inc. (1992) *505* U.S. 504, 516, summarizes the law of preemption as follows.

"Article VI of the Constitution provides that the laws of the United States 'shall be the supreme Law of the Land; ... any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.' [U.S. Const., art. VI, cl .2.] Thus, since our decision in *McCulloch v. Maryland* [(1819) 17 U.S. (4 Wheat.) 316, 427], it has been settled that state law that conflicts with federal law is 'without effect.' [Citation.] Consideration of issues arising under the Supremacy Clause 'start[s] with the assumption that the historic police powers of the States [are] not to be superseded by... Federal Act unless that [is] the clear and manifest purpose of Congress.' [Citation.] Accordingly, "[t]he purpose of Congress is the ultimate touchstone" 'of pre-emption analysis. [Citation.] [¶] ... In the absence of an express congressional command, state law is pre-empted if that law actually conflicts with federal law [citation], or if federal law so thoroughly occupies a legislative field' "as to make reasonable the inference that Congress left no room for the States to supplement it." "

In *CSX Transp., Inc. v. Easterwood* (1993) 507 U.S. *658,* 668, involving preemption of common law tort claims involving railroad safety, the United States Supreme Court referred to the "presumption against pre-emption." "In the interest of avoiding unintended encroachment on the authority of the States . . . . a court interpreting a federal statute pertaining to a subject traditionally governed by state law will be reluctant to find pre-emption." *(Id.* at pp. 663-664.) Thus, we should be particularly reluctant to find preemption when, as here, the federal law at issue involves health and safety.

II

The language of the BIA indicates no clear and manifest purpose to preempt common law tort actions by railroad employees against locomotive manufacturers. On its face, the Act applies simply to railroad carriers. The phrase "railroad carriers" appears repeatedly. (See, e.g., 49 U.S.C. § 20701 ["railroad carrier" is required to use inspected, safe equipment]; *id.*, § 20702 [Secretary of Transportation must ensure that every "railroad carrier" inspect its equipment]; *Id.*, § 20703 [accident reporting requirements for "railroad carrier"].) The text of the statute says nothing about railroad manufacturers.

The legislative history supports the conclusion that Congress intended the BIA to apply *only* to railroad carriers. Enacted as an amendment to the Federal Employers' Liability Act (FELA; 45 U.S.C. § 51 et seq.), which provides the exclusive remedy for recovery of damages by a railroad employee against a railroad carrier, the BIA was aimed at protecting employees and the traveling public from defective locomotive equipment. *(Urie v. Thompson* (1949) 337 U.S. 163, 188, 190-191; see also *Viad Corp. v. Superior Court* (1997) 55 Cal.App.4th 330, 334.) It imposes on interstate railroads an absolute duty to provide safe equipment, and subjects railroads to FELA suits by their employees for BIA violations. *(Urie v. Thompson, supra,* 337 U.S. at p. 189.) Although the original legislation contained a penalty provision that would have applied to "any common carrier *or any seller* of a locomotive boiler" (Sen. No. 236, 61st Cong., 1st Sess., p. 4 (1910), italics added), it was amended to exclude sellers. As enacted, it expressly applied to *any common carrier or carriers* (defined as a railroad) and its officers, agents, and employees, engaged in transportation by railroad. The decision to exclude "locomotive sellers" from the ambit of the BIA strongly suggests that Congress did not intend to provide nonrailroads, such as General Motors in this

case, with greater preemptive immunity from state tort claims than that enjoyed by the railroads.[1]

The overall structure of the BIA also supports the conclusion that it applies only to railroad carriers. As a federal district court recently explained: "[I]t is clear that the BIA as a whole establishes a regulatory framework within which carriers and the Secretary of Transportation -- but not railroad manufacturers -- operate. Nothing about the structure of the BIA indicates that Congress intended to bring railroad manufacturers within its regulatory web, let alone to preclude state common law actions against railroad manufacturers. [¶] . . . . The statute's text does not mention railroad manufacturers, its structure does not invite reading them into it, and federalism and history counsel leaving them out." *(Lorincie v. Southeastern Pennsylvania Transp. Auth.* (E.D.Pa. 1998) 34 F.Supp.2d 929, 934.)

The majority assert that the BIA" 'contains no evidence Congress assumed or intended state remedies for design defects would be preserved.'" (Maj. opn., *ante,* at p. 10.) It is apparent, however, that Congress could not have assumed or intended that the BIA would preempt common law claims involving health and safety by railroad employees against manufacturers because such claims *did not exist* in 1911; a railroad employee had no right of action against a manufacturer under the then-prevailing strict privity doctrine. Indeed, the doctrine of strict products liability was not established until the 1960's. (See *Greenman v. Yuba Power Products, Inc.* (1963) 59 Cal.2d *57; Vandermark v. Ford Motor Co.* (1964) 61 Cal.2d *256.)* In my view, the "field" referred to in *Napier v. Atlantic Coast Line, supra,* 272 U.S.

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[1] Only in 1988 and 1992, after the locomotives at issue here were manufactured by General Motors, was the civil penalty provision of the BIA amended to refer to "any person," defined as including any manufacturer of railroad equipment. (Former 45 U.S.C. § 34; Pub.L.No. 100-342, § 14(7) (June 22, 1988), 102 Stat. 624; Pub.L.No. 102-365, § 9(a)(8) (Sept. 3, 1991) 106. Stat. 972.)

605, does not reasonably include tort liability against nonrailroad entities that was unknown at the time Congress enacted the BIA. (See *Viad Corp. v. Superior Court, supra,* 55 Cal.App.4th at pp. 338-339.)[2]

Nor am I persuaded that a more prescient Congress would have intended to grant manufacturers immunity from damage claims by railroad employees by preempting state law claims under circumstances where identical claims may subject the railroad carrier to FELA liability. Such a rule could result in the anomaly of imposing liability on a railroad carrier for an injury it did not cause, while blanketing the manufacturer with immunity from any liability for injuries caused by its defective products. (Cf. *Ellison v. Shell Oil Co.* (9th Cir. 1989) 882 F.2d 349 [railroad may maintain an indemnity action for injuries to employee caused by a defective railroad car].) It also appears unlikely that Congress intended to shield manufacturers from all liability for the injuries of passengers and bystanders, who are not entitled to bring claims under the FELA.

Recent preemption decisions by the United States Supreme Court also dictate a different result, instructing that common law tort claims for injury are not automatically preempted even when federal legislation has been held generally to occupy the "field" in question. Rather, a defendant seeking immunity must establish that permitting such remedies would frustrate congressional objectives in enacting the legislation on which the claim of preemption is based. Thus, in *Silkwood v. Kerr-McGee Corp.* (1984) 464 U.S. 238, involving a common law tort action based on injuries from plutonium contamination, the United States Supreme Court rejected a claim that the action was preempted

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[2] The strict privity doctrine required that only the immediate buyer of a product could recover for injuries caused by a defect. (6 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 948, p. 332.) Thus, at the time the BIA was enacted, a railroad employee would have had no right of action against the manufacturer.

by the Atomic Energy Act (42 U.S.C. § 2011 et seq.) because the federal legislation occupied the entire field of nuclear safety concerns. The court held that the parameters of a preempted field "should not be judged on the basis that the Federal Government has so completely occupied the field of safety that state remedies are foreclosed but on whether there is an irreconcilable conflict between the federal and state standards or whether the imposition of a state standard in a damages action would frustrate the objectives of the federal law." (464 U.S. at p. 256.) It examined the legislative history of the Atomic Energy Act and determined that there was no indication of congressional intent to preclude state law remedies.

Similarly, *Medtronic, Inc. v. Lohr* (1996) 518 U.S. 470 rejected a claim that the Medical Device Amendments of 1976 (21 U.S.C. § 360c et seq.) preempted state law on the safety and effectiveness of medical devices intended for human use. Emphasizing the presumption against preemption, the court looked at the structure and purpose of the statute. It found nothing in the text of the statute, which contained no provision regarding a right of action against manufacturers, and nothing in its legislative history suggesting a congressional intent to bar product liability actions. "The legal duty that is the predicate for the Lohrs' negligent manufacturing claim is the general duty of every manufacturer to use due care to avoid foreseeable dangers in its products. . . . These state requirements . . escape pre-emption, not because the source of the duty is a judge-made common-law rule, but rather because their generality leaves them outside the category of requirements that [the preemption statute] envisioned to be 'with respect to' specific devices such as pacemakers." (518 U.S. at pp. 501-502.)

Under the tests applied by the United States Supreme Court in *Silkwood* and *Medtronic,* the BIA does not preempt plaintiffs' claims against General Motors. As discussed, neither the text nor the legislative history of the Act permits the conclusion that Congress intended to restrict employees

and others from obtaining a common law remedy for injuries caused by manufacturers' defective products; such a remedy did not even exist at the time the BIA was enacted. More specifically, General Motors presented no evidence of any BIA regulations concerning asbestos. According to the materials submitted by the parties, the use of asbestos in locomotives has never been and apparently never will be regulated. (Off of Safety Assurance and Compliance, Rep. to Cong., Locomotive Crashworthiness and Cab Working Conditions (Sept. 1996), pp. 10-10 to 10-12.) Locomotive manufacturers freely made the decision to use asbestos materials; now those manufacturers, including General Motors, have ceased using asbestos and have adopted policies prohibiting its future use, presumably because of its toxicity. *(Ibid.)* The state law remedies at issue here pose no threat to federal objectives under the BIA, past, present, or future. Nor is there any irreconcilable conflict between federal and state standards with regard to asbestos use.

The majority rest their holding on the premise that allowing these plaintiffs a remedy against General Motors will undermine national uniformity with regard to railroad equipment. Unlike the majority, I doubt that promoting national uniformity – as opposed to safety – was the primary purpose of the BJA. But even if it were, I do not agree that regulatory uniformity will be impaired unless we insulate General Motors from damages for injuries caused by its defective products. The majority raise a false specter of railroads having to change equipment at state lines. As discussed, there has never been any form of federal regulation on the issue of asbestos use in locomotives that would contravene plaintiffs' theory of recovery, nor is it plausible that any other state will require trains to install defective asbestos insulation on locomotives. Indeed, because of its well-known dangers, asbestos insulation is no longer used in the manufacture of locomotives.

III

The majority's result will unfairly impair the ability of former railroad employees and their families to seek an adequate remedy for their asbestos-related injuries. I fail to see how that rationally advances any federal policy under the BIA. Because I discern no clear and manifest evidence of congressional purpose to preempt the claims raised herein, I would reverse the judgment of the Court of Appeal.

Mosk, J.

Name of Opinion Scheiding v. General Motors Corporation

Unpublished Opinion
Original Appeal
Original Proceeding
Review Granted XXX 65 Cal.App.4th 1310
Rehearing Granted

Opinion No. 5073 196
Date Filed: March 9, 2000

Court: Superior
County: San Francisco
Judge: David A. Garcia

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Filed 8/3/98

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION TWO

ROBERT SCHEIDING ET AL.,

Plaintiffs and Appellants,

v.

GENERAL MOTORS CORPORATION,

Defendant and Respondent.

[And four other cases]*

A076324 (CONSOLIDATED WITH A076333, A076341, A076352, A076730)

(SAN FRANCISCO COUNTY SUPERIOR COURT NOS.964534, 964765, 964349, 957535, 964764)

INTRODUCTION

In five related appeals, former railroad workers, their spouses and survivors seek to overturn judgments dismissing their various tort actions against locomotive manufacturer General Motors Corp. (hereinafter GMC) for asbestos-related injuries. These dismissals followed the superior court's grant of judgment on the pleadings in four of the actions and grant of summary judgment in favor of GMC on the fifth, all on the

grounds of federal preemption of the state court causes of action by the Locomotive Boiler

* *Hcllquist v. General Motors Corporation (No.* A076333); *Blackburn v. General Motors Corporation (No.* A076341); *Goodyear v. General Motors Corporation (No.* A076352); *Umphriss v. General Motors Corporation (No.* A076730). Inspection Act (hereinafter referred to as the BIA, formerly 45 U.S.C. §§ 22-34, now recodified in the Transportation Code, 49 U.S.C. § 20701 et seq.).

The question here is whether the federal BIA preempts state tort actions against the designer and manufacturer of locomotives for injuries suffered by railroad employees resulting from exposure to asbestos containing materials in those locomotives. More than 70 years ago, the United States Supreme Court in *Napier v. Atlantic Coast Line.* (1926) 272 U.S. 605, addressed the question of the preemptive scope of the BIA. Nevertheless, the question is closer than may at first appear. Our analysis is assisted by the presence of two thoughtful and well reasoned recent cases: *Law v. General Motors Corp.* (9th Cir. 1997) 114 F.3d 908 and *Viad Corp. v. Superior Court* (1997) 55 Cal.App.4th 330. Both cases address the scope of BIA preemption of state law claims including, among others, strict product liability, negligence, and breach of warranty. The two cases reach diametrically opposing conclusions.

We are convinced that *Napier v. Atlantic Coast Line., supra,* 272 U.S. 605, which specifically addressed the scope and effect of the BIA, continues to control. Consequently, we conclude that the BIA occupies the field of locomotive equipment design, manufacture and materials, preempting all state law claims within that field. We shall affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

GMC, through its Electro-Motive Division, is a manufacturer of diesel electric locomotives. These are

powered in part by diesel engines which burn diesel fuel. These engines contain some asbestos materials.[1]

Harry Goodyear, Victor Hellquist, Robert Scheiding, Gaylord Blackburn and Billy Umphriss worked in or around locomotives at some time between the 1940's and the 1980's. Plaintiffs in each of these five actions alleged below that GMC's locomotives and related equipment were defective because they released asbestos fibers into the atmosphere where these railroad employees worked and onto their clothing. *Goodyear* and *Hellquist are* wrongful death and survival lawsuits brought by the spouses of workers who died as a result of asbestos illnesses. *Scheiding, Blackburn* and *Umphriss* were filed by the injured employees themselves.[2] The complaints in each case allege against GMC

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[1] At our request, the parties have generally identified the following components of a GMC diesel electric locomotive as possibly having contained asbestos:

> "Steam Generators: Used as insulation on passenger locomotives, primarily to provide steam heat for the passenger and dining cars;
>
> "Diesel Exhausts: Used to insulate certain diesel-exhaust stacks;
>
> "Insulating Tape: Used in varying thicknesses of between 1/16th to 1/2 inch on the steam line from the steam generator, as well as some of the water feed/supply lines within the locomotive cab.
>
> "Gaskets: Used on the diesel engines (heads, manifolds, exhaust, etc.), as well as on flanges for steam or other hot-fluid lines.
>
> "Electrical Motors: Used as insulation on windings and/or on wiring itself;
>
> "Traction Motors: Possibly used for insulating electrical windings;
>
> "Brakeshoes: Experimentally used between 1964 and 1983 in certain friction composite brake shoes.
>
> "Air Lines: Possibly used as a protective sleeve on airbrake lines." (Letter of May 20, 1998, jointly submitted by the parties)

[2] Harry Goodyear worked as a railroad machinist and locomotive mechanic from 1952 through 1983. Five years later, he was diagnosed with asbestosis and asbestos related pleural disease. He died on May 13, 1993, as a result of these diseases. His wife filed this wrongful death action on December 30, 1993.

causes of action for negligence, strict liability, and false representation, as well as wrongful death and survival in *Goodyear* and *Hellquist* and negligent infliction of emotional distress and loss of consortium in *Scheiding, Blackburn* and *Umphriss*.[3]

GMC moved for summary judgment in each of the five cases on the grounds that the BIA preempted the strict product liability and other state common law claims. The San Francisco Superior Court treated four of these motions as motions for judgment on the pleadings, granting them without

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Victor Hellquist worked as a sheetmetal worker, pipefitter and quality-control inspector for the Atchison, Topeka & Santa Fe Railway and Amtrak from 1950 through 1985. He was diagnosed with mesothelioma, an asbestos caused cancer of the outer lung lining on August 12, 1993. He died of the disease on November 2, 1993. On October 27, 1994, his wife and children initiated this wrongful death lawsuit.

Robert Scheiding worked as an electrician for Southern Pacific Railroad, among other companies, from 1950 through 1957. He retired in 1976 and was subsequently diagnosed with asbestosis and asbestos pleural disease. This action, filed on October 18, 1994, seeks compensation for his asbestos injuries and for his wife's loss of consortium.

Gaylord Blackburn worked as an electrician for various entities, including Western Pacific Railroad from 1946 through 1961. He retired in 1988 and was diagnosed with asbestos related pleural disease on July 9, 1992. He and his wife filed this lawsuit seeking compensation for his asbestos injuries and for his wife's loss of consortium.

Billy Umphriss was employed as an engine supplyman and fireman for the Union Pacific Railroad from 1941 through 1942 and from 1950 through 1961. He also worked as a fireman and third engineer for several maritime companies. He was diagnosed with asbestosis and asbestos related pleural disease in May 1994 and with asbestos related lung cancer in September 1994. In this action he seeks compensation for his asbestos related injuries.

[3] In most of these actions, due to the nature of their careers, appellants were possibly exposed to asbestos from a variety of sources. As is typical in asbestos litigation, appellants named close to two hundred defendants in their original complaints. As against defendant GMC, appellants alleged that the locomotives and their component pans were unsafe under the federal BIA.

leave to amend. In *Umphriss* the court granted summary judgment in favor of GMC on preemption grounds.

On August 30, 1996, judgment was entered in favor of GMC in *Goodyear, Hellquist, Scheiding,* and *Blackburn.* On November 4, 1996 judgment was entered in favor of GMC in the *Umphriss* action. Timely appeals followed.

DISCUSSION

A. Preemption.

The Supremacy Clause (U.S. Const., art. VI, § 2) allows Congress to supplant state regulation with uniform national roles. The doctrine of federal preemption, derived from the Supremacy Clause, is designed to prevent states from impinging on federal law and policy. *(Cipollone v. Liggett Group, Inc.* (1992) 505 U.S. 504, 516; *Law v. Genera] Motors Corp., supra,* 114 F.3d 908, 909 [hereafter *Law]; Viad v. Superior Court, supra,* 55 Cal.App.4th 330, 333 [hereafter *Viad].)*

Because of the importance of federalism in our constitutional structure, all preemption cases begin with the strong presumption that federal statutes do not supersede the historic police powers of the state in areas like health and safety. As recognized repeatedly by our United States Supreme Court: "we 'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.' [Citations.]" *(Medtronic, Inc. v. Lohr* (1996) 518 U.S. 470, 485, quoting *Rice v. Santa Fe Elevator Corp.* (1947) 331 U.S. 218, 230.) Accordingly, "[p]remption fundamentally is a question of congressional intent." *(English v. General Electric Co.* (1990) 496 U.S. 72, 78-79; accord *Viad, supra,* at p. 333.) Further, this presumption applies not only to the question whether Congress intended any preemption at all, but also to the *scope* of its intended invalidation of state law. *(Medtronic, Inc. v. Lohr, supra,* 518 U.S. 470, 485, citing *Cipollone, supra,* at pp. 518, 523.) "It is

the burden of the party claiming preemption to prove Congress's intent. *(De Canas v. Bica* (1976) 424 U.S. 351,357 *)" (Viad, supra,* at p. 333.)

"Congress' intent may be 'explicitly stated in the statute's language or implicitly contained in its structure and purpose.' [Citation.] In the absence of an express congressional command, state law is pre-empted if that law actually conflicts with federal law, [citation] or if federal law so thoroughly occupies a legislative field '"as to make reasonable the inference that Congress left no room for the States to supplement it."' [Citations.]" *(Cipollone v. Liggett Group, Inc.* (1992) 505 U.S. 504, 516.) Stated otherwise, state law is preempted in three circumstances: (1) where Congress explicitly defines the extent to which its enactments preempt state law (express preemption); (2) where Congress' intent to preempt state law may be inferred from a pervasive scheme of federal regulation or where the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject (field preemption); and (3) where federal law actually conflicts with state law and it is not possible for a private party to comply with both requirements (conflict preemption). *(English v. General Electric Co., supra,* 496 U.S. 72, 78-79.)

B. The BIA.

In its present form, section 20701 provides:

"A railroad career may use or allow to be used a locomotive or tender on its railroad line only when the locomotive or tender and its parts and appurtenances --

(1) are in proper condition and safe to operate without unnecessary danger of personal injury;

(2) have been inspected as required under this chapter and regulations prescribed by the Secretary of Transportation under this chapter; and

(3) can withstand every test prescribed by the Secretary under this chapter." (49 U.S.C.A. § 20701; added Pub. L. 103-272, § l(e) July 5, 1994, 108 Stat. 885.)

In 1988 and 1992, the civil penalty provision of the BIA for violations of the Act, rules or regulations made under its provisions or the lawful orders of any inspector was amended to include manufacturers, among others.[4]

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[4] The legislative history of the BIA is described in detail in *Viad, supra,* at pp. 334-335: "The BIA was enacted in 1911, as an amendment to the Federal Employers' Liability Act (FELA, 45 U.S.C. § 51 et seq.). *(Urie v. Thompson* (1949)337 U.S. 163, 189 [69 S.Ct. 1018, 1034, 93 L.Ed. 1282, 11 A.L.R.2d 252].) In its original codification, the BIA provided, inter alia: (1) that it applied to any common carrier or carriers (defined as a railroad), their officers, agents, and employees, engaged in the transportation of passengers or property by railroad; (2) that it was unlawful for any common carrier to use any locomotive engine propelled by steam unless its boiler and appurtenances were in proper condition and safe to operate, and that ail boilers shall be inspected from time to time and be able to withstand such test or tests as prescribed in the rules and regulations therein; (3) that a chief inspector and two assistant inspectors shall be appointed to ascertain that common carriers observe the requirements of the act; (4) there would be fifty inspectors assigned to the different states, each having certain job qualifications; (5) that each common carrier was required to file its rules and instructions for inspection with the chief inspector; (6) that each inspector had certain specified duties; (7) that the chief inspector must report to the Interstate Commerce Commission on an annual basis; and (8) that a statement of all accidents must be filed with the chief inspector. (Pub.L. No. 383 (1911) §§ 1-8, 36 Stat. 913-916.)

"In addition, it contained a provision 'That any common carrier violating this Act or any rule or regulation made under its provisions or any lawful order of any inspector shall be liable to a penalty of one hundred dollars for each and every such violation, to be recovered in a suit or suits to be brought by the United States attorney . . . ' (Pub.L. No. 383 (1911) § 9, 36 Stat. 916.)

"In 1915 and 1924, the BIA was amended to include the entire locomotive and all its parts. The statute was also amended several times between 1940 and 1980 in portions not pertinent to our discussion.

"In 1988 and 1992, however, the civil penalty provision of the BIA was amended to read as follows: 'Any person (including but not limited to a

"The BIA was enacted in 1911, as an amendment to the Federal Employers' Liability Act (FELA, 45 U.S.C. § 51 et seq.). *(Urie v. Thompson* (1949) 337 U.S. 163, 189 [69 S.Ct. 1018, 1034, 93 L.Ed. 1282, 11 A.L.R.2d 252].)" *(Viad, supra,* at p. 334.) "The purpose in enacting the BIA was to protect train service employees and the traveling public from defective locomotive boilers and equipment. (Urie v. *Thompson, supra,* 337 U.S. at pp. 190-191 [69 S.Ct. at pp. 1034-1035].) '[I]t has been held consistently that the [BIA] supplements the [FELA] by imposing on interstate railroads "an absolute and continuing duty" to provide safe equipment. [Citations.]' *(Id.* at p. 188 [69 S.Ct. at p. 1034].) In addition to the civil penalty, a person harmed by violation of the BIA is given recourse to sue under FELA, which applies only to railroad employees injured while engaged in interstate commerce. *(Id.* at p. 189 [69 S.Ct. at p. 1034]; see *Crane v. Cedar Rapids & I.C.R. Co.* (1969) 395 U.S. 164, 166 [89 S.Ct. 1706, 1708, 23 L.Ed.2d 176].) FELA provides the exclusive remedy for recovery of damages against a railroad by its employees. *(Lilly v. Grand Trunk R. Co.* (1943)317 U.S. 481,485 [63 S.Ct. 347, 350-351, 87 L.Ed. 411].) FELA liability is expressly limited to common carriers. (45 U.S.C. § 51.)" *(Viad, supra,* at p. 335.)

The power that was originally conferred on the Interstate Commerce Commission was later transferred to the Secretary

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railroad; any manager, supervisor, official, or other employee or agent of a railroad; any owner, *manufacturer,* lessor, or lessee of railroad equipment, track, or facilities; any independent contractor providing goods or services to a railroad; and any employee of such owner, manufacturer, lessor, lessee, or independent contractor) violating sections 22 to 29 and 31 to 34 of this title, or any rule or regulation made under its provisions or any lawful order of any inspector, shall be liable to a penalty . . . .' (Former 45 U.S.C. § 34, Pub.L. No. 100-342 (1988) § 14(7), 102 Stat. 633; Pub.L. No. 102-365 (1992) § 9(a)(8), 106 Stat. 978.)" *(Viad, supra,* 55 Cal.App.4th at p. 334, italics added.)

In 1994, the particular words describing "[a]ny person" were "omitted as surplus " (See, 49 U.S.C.A. § 21302, Historical and Statutory Notes Revision Notes and Legislative Reports 1994 Acts, p. 127.)

of the Department of Transportation in 1966. *(Marshall v. Burlington Northern, Inc.* (9th Cir. 1983) 720 F.2d 1149.)

C. Napier.

In 1926 the Supreme Court in *Napier v. Atlantic Coast Line., supra,* 272 U.S. 605 *(Napier)* specifically addressed the scope and effect of the BIA, concluding it occupies the field of locomotive equipment, preempting all state law claims within that field. *Napier* involved challenges to two state statutes which required all trains operating in the state to have an automatic firedoor and a cab curtain. The Supreme Court invalidated these regulations, holding that the BIA precluded states from imposing additional requirements for locomotive equipment. Speaking for the unanimous court, Justice Brandeis observed that Congress had not legislated, nor had the Interstate Commerce Commission, which had been given the power to regulate "'the entire locomotive and tender and all parts and appurtenances thereof'" *(id.* at p. 608), made any order with respect to either device. *(Id.* at p. 609.) Further, the court "assumed, also, that there is no physical conflict between the devices required by the State and those specifically prescribed by Congress or the Interstate Commerce Commission; and that the interference with commerce resulting from the state legislation would be incidental only." *(Id.* at pp. 610-611, fn. omitted.) Nevertheless, *Napier* reasoned that "the power delegated to the Commission by the Boiler Inspection Act as amended is a general one. *It extends to the design, the construction and the material of every part of the locomotive* and tender and of all appurtenances." (*Id.* at p. 611, italics added.) "The federal and the state statutes are directed to the same subject -- the equipment of locomotives. They operate on the same object . . . . The fact that the Commission has not seen fit to exercise its authority to the full extent conferred, has no bearing upon the construction of the Act delegating the power." *(Id.,* at pp. 612-613.)

The broad scope of the authority conferred upon the Commission to regulate the design, construction and material

of every part of the locomotive, led the court to the conclusion that the BIA was intended to occupy "the field of regulating locomotive equipment" *(id.,* at pp. 607, 613) and therefore preempted the state laws.

Napier has been followed consistently by the lower federal courts, including recently by the Ninth Circuit in *Law v. General Motors Corp., supra,* 114 F.3d 908. (See, e.g., *Springston v. Consolidated Rail Corp.* (6th Cir. 1997) 130 F.3d 241; *Marshall v. Burlington Northern Inc., supra,* 720 F. 2d 1149.)

D. Law.

In Law v. General Motors Corp., supra, 114 F.3d 908, railroad workers claimed their hearing had been severely damaged by excessive noise generated by locomotive brakes and engines, in addition to the usual bells and whistles. They sued defendant locomotive manufacturers under various state law tort theories for defective design, failure to insulate their work stations properly and failure to warn of hearing risk. The Ninth Circuit concluded that the BIA preempts state common law remedies against railroad manufacturers for injuries arising out of alleged design defects in their trains.[5] It affirmed the district court's dismissal of the workers' state law claims. *(Id.* at pp. 909, 913.)

Law rejected plaintiffs' claims that the BIA only preempted direct state regulation of railroad safety, not common law tort liability; and that the BIA did not preempt suits against manufacturers for design defects. *(Id.* at p. 909.) Relying upon *Napier, Law* reasoned that "[i]t has long been settled that Congress intended federal law to occupy the field of locomotive equipment and safety, particularly as it relates to injuries suffered by railroad workers in the course of their

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[5] In a footnote, the *Law* court limited its holding to "state claims alleging that manufacturers defectively designed a locomotive or its parts. We do not reach the question of whether claims for manufacturing defects are likewise preempted by the BIA." *(Id.* at p. 912, fn. 2.)

employment." *(Law, supra,* at p. 910.) Such "broad preemptive sweep is necessary to maintain uniformity of railroad operating standards across state lines." *(Ibid.)* Plaintiffs' common law claims come within the preempted field as they threaten to undermine the integrated network of federal law regulating railroads. *(Ibid.)*

The Secretary of Transportation has authority to regulate the design of the parts plaintiffs claimed were defective and has promulgated highly detailed regulations establishing maximum levels of locomotive cab noise, sound levels and placement requirements for bells and whistles, as well as design requirements for brakes, engines and body structures. *(Id.* at p. 911.) The possibility that manufacturers could escape liability without deviating from federal standards by requiring workers to wear protective headgear or by posting warnings did not prevent conflict, as such remedies also implicated the BIA. Decisions concerning protective headgear are left to the Federal Railroad Administration in consultation with the Occupational Safety and Health Administration. The Secretary has authority to require warnings. *(Ibid.)*

Law rejected the distinction that the BIA speaks to railroad carriers and not to manufacturers. The court reasoned that imposition of tort liability on manufacturers would "affect 'the design, the construction, and the material' of locomotives . . . by forcing them to conform to design and construction standards imposed by the states." *(Id.* at p. 911.) "This would transfer the regulatory locus from the Secretary of Transportation to the state courts -- a result the BIA was clearly intended to foreclose." *(Id.* at pp. 911-912, fn. omitted.)

Law also rejected the contention that plaintiffs would be without remedy were manufacturers held not liable for design defects. Under the FELA, 45 U.S.C. § 51, et seq., railroad workers may recover against their *employers* (railroad operators, not manufacturers) for all occupational injuries. The unavailability of punitive damages under FELA does not permit states to supplement this "'exclusive remedy.'" *(Id.,* at

p. 912, citing *Wildman v. Burlington Northern R.R.* (9th Cir. 1987) 825 F.2d 1392, 1395.) Further, disallowing suits against manufacturers would not decrease incentives on manufacturers to design and produce safe products, as locomotive manufacturers already have every incentive to comply with federal standards. *(Law, supra,* at p. 912.)

E. Viad Corp. v. Superior Court.

The Second District in *Viad, supra, 55* Cal.App.4th 330, found *Napier* no longer controlling on the preemption issue, "primarily on the reasoning of two recent Supreme Court decisions filed more than fifty years after the *Napier* case, *Medtronic, Inc. v. Lohr, supra,* 518 U.S. [470], . . . and *Silkwood v. Kerr-McGee Corp.* (1984) 464 U.S. 238 . . . ." *(Viad, supra,* at p. 335.)[6]

In Viad, plaintiffs (employees and relatives of employees of the Santa Fe and Southern Pacific railroads) filed a personal injury and wrongful death lawsuit against Viad Corp. for damages resulting from their exposure to asbestos insulation contained on locomotives manufactured by Viad Corp.'s predecessor in interest. Viad Corp. moved for summary judgment on the grounds that the negligence, strict product liability, warranty, personal injury and wrongful death actions were preempted by the BIA. *(Id.* at p. 332.) The trial court ruled in favor of plaintiffs, concluding the BIA as originally enacted and prior to its 1988 amendment was limited in application to common carriers with the goal of protecting employees from employers and was not so pervasive as to preempt the entire field. After oral argument, the Court of Appeal denied Viad Corp.'s writ petition. Although it recognized *Napier* "*[r]ead* in a vacuum . . . appears to directly address and resolve the issue of whether real parties' action is preempted by the BIA" *(id.* at p. 336), the court stated it was guided by more recent analyses

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[6] *Law* and *Viad* were decided within days of each other. Unsurprisingly, neither opinion refers to the other.

employed by the United States Supreme Court in *Medtronic, Inc. v. Lohr, supra,* 518 U.S. 470, *(Medtronic)* and *Silkwood v. Kerr-McGee Corp. (1984)* 464 U.S. 238 *(Silkwood)* involving state tort actions. Consequently, the *Viad* court construed the "language in *Napier* that Congress intended to occupy 'the field of regulating locomotive equipment' . . .narrowly in light of the circumstances in existence at the time of its writing and in light of the statutory framework as a whole." *(Id.* at p. 341, fn. omitted.)

Viad discussed the preemption tests articulated in *Medtronic* and *Silkwood* and concluded that, notwithstanding *Napier*, the tort damages sought by the plaintiffs against the manufacturer were not preempted by the BIA.

After careful consideration, we are not persuaded by *Viad's* analysis of the preemption issue and cannot agree that *Medtronic* and *Silkwood* have so changed field preemption analysis as to fundamentally undermine *Napier* and its progeny. To explain our disagreement with *Viad*, we must first describe *Medtronic* and *Silkwood. Medtronic, Inc. v. Lohr, supra*, 518 U.S. 470, involved a tort suit against a pacemaker manufacturer under the federal Medical Device Amendments of 1976 (MDA) (21 U.S.C. § 360c et seq.) by a Florida woman injured when her pacemaker failed. The statute in *Medtronic* contained an *express* preemption clause, which prohibited establishment of any state requirement different from that contained in the MDA.[7] It contained no provision regarding a right of action against manufacturers. Noting the presumption against preemption, the Supreme Court discerned Congress's purpose through examination of

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[7] The preemption section of the statute provided: "'no State or political subdivision of a State may establish or continue in effect with respect to a device intended for human use any requirement (1) which is different from, or in addition to, any requirement applicable under this chapter to the device, and (2) which relates to the safety or effectiveness of the device or to any other matter included in a requirement applicable to the device under this chapter.'" *(Medtronic,* at pp. 481-482.)

the "language of the preemption statute and the 'statutory framework' surrounding it. [Citation.]" *(Id.* at p. 486.) Also relevant was "the 'structure and purpose of the statute as a whole,' [citation], as revealed not only in the text, but through the reviewing court's reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law." *(Ibid.)*

The Supreme Court found no indication in the legislative history that Congress meant to preclude product liability suits, which were prevalent at the time of enactment of the MDA. The court viewed the legislative history as indicating "that any fears regarding regulatory burdens were related more to the risk of *additional* federal and state regulation rather than the danger of preexisting duties under common law. [Citation.]" *(Id.* at p. 490, italics in original.) The court further found Medtronic's preemption argument "implausible" *(id.,* at p. 487) as it's construction of the statute would "have the perverse effect of granting complete immunity from design defect liability to an entire industry that, in the judgment of Congress, needed more stringent regulation in order 'to provide for the safety and effectiveness of medical devices intended for human use.' [Citation.]" *(Id.* at p. 487.) The court also found it "difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct,' . . . ." (*Id.* at p. 487, quoting *Silkwood, supra,* at p. 251.)

The *Medtronic* plurality concluded, "Nothing in 360k denies Florida the right to provide a traditional damages remedy for violations of common-law duties when those duties parallel federal requirements." *(Id.* at p. 495.) In reaching this conclusion the court acknowledged its interpretation of the preemption statute was "substantially informed" by FDA regulations interpreting the scope of § 360k's preemptive effect. *(Id.* at p. 495.) According to the court, the agency "is uniquely qualified to determine whether a particular form of state law 'stands as an obstacle to the

accomplishment and execution of the full purposes and objectives of Congress,' [citation] and, therefore, whether it should be preempted." Regulations promulgated by the FDA provided that the statute did not preempt state or local requirements equal or substantially identical to those of the MDA and that state requirements were preempted only when the FDA has established specific counterpart regulations or specific requirements applicable to a particular device.[8] These regulations evinced an "overarching concern that preemption occur only where a particular state requirement threatens to interfere with a specific federal interest." *(Id.* at p. 500.)

The *Medtronic* majority rejected the argument that any common law cause of action was a "requirement" altering incentives and imposing duties different from or in addition to promulgated FDA standards and that all common law claims by injured plaintiffs against manufacturers of medical devices were prohibited. (518 U.S. at p. 486.) The majority agreed that the express preemption of requirements imposed by the states did not *necessarily* preclude all common law tort actions. (518 U.S. at pp. 486-491.) A plurality concluded that "given the critical importance of device-specificity in our (and the FDA's) construction of § 360k, it is apparent that few, if any, common-law duties have been pre-empted by this statute." *(Id.* at p. 502.)

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[8] The court described these FDA regulations in pertinent part: "§ 360k 'does not preempt State or local requirements that are equal to or substantially identical to, requirements imposed by or under the act.' 21 CFR § 808.1(d)(2) (1995); [citation]." *(Id.* at pp. 496-497.)

"FDA regulations . . . provide that state requirements are preempted 'only' when the FDA has established 'specific counterpart regulations or . . . other specific requirements applicable to a particular device.' 21 CFR § 808. l(d) (1995). They further note that the statute is not intended to pre-empt 'State or local requirements of general applicability where the purpose of the requirement relates either to other products in addition to devices . . . or to unfair trade practices in which the requirements are not limited to devices.' § 808.1(d)(1)" *(Id.* at pp. 498-499, fn. omitted.)

Unconvinced that "future incidents of MDA pre-emption of common-law claims will be 'few' or 'rare'" (id. at p. 508), Justice Breyer nonetheless concurred on the grounds that there was "no actual conflict between any federal requirement and any of the liability-creating premises of the plaintiffs' state law tort suit" *(ibid)* and that neither "Congress [nor] the FDA intended the relevant FDA regulations to occupy entirely any relevant field." *(Ibid.)* Justice Breyer also observed that the "MDA will sometimes preempt a state law tort suit." *(Id.,* at p. 504.) "The effects of the state agency regulation and the state tort suit are identical." *(Id.* at p. 504.) In a concurring and dissenting opinion by Justice O'Connor, four justices contended that "state common-law damages actions do impose 'requirements.' [Citation.]" *(Id.* at p. 510, citing *Cipollone v. Liggett Group, Inc.,* 505 U.S. 504.) They argued there was no distinction between requirements and prohibitions posed by positive enactments and those taking the form of common law rules. *(Id.* at p. 510.) Both Justice Breyer and the concurring and dissenting justices agreed with the statement in *Cipollone* that "'[state] regulation can be as effectively exerted through an award of damages as through some form of preventive relief.' [Citation.]" (518 U.S. at p. 504, Breyer, J., concurring and p. 510, O'Connor, J., concurring in part and dissenting in part).

In *Silkwood v. Kerr-McGee Corp., supra,* 464 U.S. 238, a nuclear laboratory worker's father sued under state common law tort principles for injuries his deceased daughter had suffered from plutonium contamination. The Supreme Court held that a claim for punitive damages arising out of the escape of plutonium from a licensed nuclear facility was not preempted by the federal Atomic Energy Act, despite "an earlier decision, *Pacific Gas & Elec. v. Energy Resources Comm'n.* (1983) 461 U.S. 190 [103 S.Ct. 1713, 75 L.Ed.2d 752], in which it had held the same statute was intended to occupy 'the entire field of nuclear safety concerns.' *(Id.* at p. 212 [103 S.Ct. at p. 1726].)" *(Viad, supra,* at p. 337.) In doing so, the Supreme Court employed both a field preemption and a conflict preemption analysis *(Silkwood,*

supra, at p. 248), and relied upon a legislative history which revealed a congressional awareness of existing tort remedies as well as closely related legislation providing evidence that Congress did not intend to preclude those state law remedies. "[T]he only congressional discussion concerning the relationship between the Atomic Energy Act and state tort remedies indicates that Congress assumed that such remedies would be available." *(Id.* at p. 251.) The Price-Anderson Act (Pub. L. 85-256, 71 Stat. 576) was passed as an amendment to the Atomic Energy Act. It established an indemnification scheme aimed at protecting the industry from potentially bankrupting state-law suits arising out of a nuclear incident. *(Id.* at p. 251.) The court in *Silkwood* discussed the legislative history of the Price-Anderson Act at length, concluding that "the discussion preceding its enactment and subsequent amendment indicates that Congress assumed that persons injured by nuclear accidents were free to utilize existing state tort law remedies." *(Id.* at pp. 251-252, fn. omitted.) This was so "notwithstanding the NRC's exclusive regulatory authority." *(Id.* at p. 254.)

The court also concluded that the Atomic Energy Act's scheme for the assessment of civil penalties did not conflict with an award of punitive damages, finding (see *Silkwood, supra,* at pp. 249-258) "ample evidence that Congress had no intention of forbidding the States to provide such remedies." *(Silkwood,* 464 U.S. at p. 251.) Congressional silence took on "added significance in light of Congress' failure to provide any federal remedy for persons injured by such conduct." *(Id.* at p. 251.)

Subsequently, in *English v. General Electric Company, supra,* 496 U.S. 72, the Supreme Court revisited the issue of preemption in the nuclear safety arena. The court concluded that federal law did not preempt a state law cause of action for intentional infliction of emotional distress brought by an employee whistleblower alleging retaliation by the employer. After reviewing the relevant statutory provisions and legislative history, the court held the action did not fall within

the boundaries of the preempted field of nuclear safety. The court looked first to the purpose of the state law in question, finding it was not motivated by safety concerns. The court then addressed what it considered the "real issue:" whether the state "tort claim is so related to the 'radiological safety aspects involved in the . . . operation of a nuclear [facility],' . . . that it falls within the preempted field." *(Id.* at p. 85, quoting *Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Comm'n.* (1983) 461 U.S. 190, 205.) The court recognized that "not every state law that in some remote way may affect the nuclear safety decisions made by those who build and run nuclear facilities can be said to fall within the pre-empted field." *(Id.,* at p. 85.) "Instead, for a state law to fall within the pre-empted zone, it must have some direct and substantial effect on the decisions made by those who build or operate nuclear facilities concerning radiological safety levels. We recognize that the claim for intentional infliction of emotional distress at issue here may have some effect on these decisions, because liability for claims like petitioner's will attach additional consequences to retaliatory conduct by employers. As employers find retaliation more costly, they will be forced to deal with complaints by whistle-blowers by other means, including altering radiological safety policies. Nevertheless, we believe that this effect is neither direct nor substantial enough to place petitioner's claim in the preempted field." *(Ibid.)*

The court acknowledged that such result was "strongly suggested" by *Silkwood. (Ibid.)* Observing that *"Silkwood* was based in substantial part on legislative history suggesting that Congress did not intend to include in the pre-empted field state tort remedies for radiation-based injuries" *(id.,* at p. 86), the *English* court reasoned that potential liability for the kind of claim at issue in *Silkwood* (state tort remedies/damages for radiation-based injuries) would affect radiological safety decisions more directly and more substantially than will potential liability for emotional distress caused by retaliation for whistleblowing activities. *(Id.* at p. 86.) Consequently, the court found "no evidence of a 'clear and manifest' intent

on the part of Congress to pre-empt tort claims like petitioner's. [Citation.]" *(Id.* at p. 86.) The court concluded "that petitioner's claim for intentional infliction of emotional distress does not fall within the pre-empted field of nuclear safety as that field has been defined in prior cases." *(Id.* at p. 90.)

We disagree with *Viad* that *Medtronic* and *Silkwood* have changed preemption analysis so as to undermine the holding of *Napier* that the BIA "has occupied the field of regulating locomotive equipment" *(Napier,* at p. 607), preempting all state legislation within that field *(id.,* at pp. 611,613), and that the preemptive scope of the BIA "extends to the design, the construction and the material of every part of the locomotive and tender and of all appurtenances." *(Id.,* at p. 611.)

First of all, *Medtronic* was not even a field preemption case, but involved an express preemption clause prohibiting establishment of a state requirement different from that contained in the MDA. The court relied both upon the legislative history of the MDA, which indicated no intent to interfere with prevalent state tort remedies and upon comprehensive FDA regulations narrowly interpreting the scope of the MDA's preemptive effect and evincing an "overarching concern that pre-emption occur only where a particular state requirement threatens to interfere with a specific federal interest." *(Medtronic, supra,* 518 U.S. at p. 500.)

English defined the field which the Atomic Energy Act occupied as that of "radiological safety." *(English, supra,* 496 U.S. at pp. 82, 85.) In *Silkwood,* the court found no congressional intent to preempt punitive damages actions for conduct relating to radiation hazards. The court was greatly influenced by the Price-Anderson Act, enacted in 1957, which evidenced a congressional intent that state court remedies would not be affected by AEC regulations. *(Id.* at pp. 251-255.) The court was also influenced by Congress' failure to provide any alternate federal remedy for persons injured by

exposure to hazardous nuclear materials. *(Id.* at p. 251.) In both *Medtronic* and *Silkwood*, the Supreme Court did not believe Congress would, without comment, supplant existing state tort remedies, leaving victims no remedy. *(Silkwood,* at p. 251; *Medtronic,* at p. 487.)

In contrast to the statutory schemes under scrutiny in *Silkwood* and *Medtronic,* there was no tort remedy extant at the time the BIA was enacted. (See discussion, *infra*, at p. 19) Further, Congress here has provided a remedy for injured employees in the form of the FELA, leading to an inference that Congress intended to supplant other remedies which might in future be enacted by state law. As *Viad* recognized, the primary aim behind both the BIA and the FELA was safety. *(Viad,* at p. 337.) The FELA was originally crafted to shift "'part of the "'human overhead'" of doing business from employees to their employers. [Citations.]'" *(id.* at p. 337) and that it since has been "construed liberally to further Congress's remedial and humanitarian goal. [Citations.] One of the primary purposes of FELA was to eliminate defenses to tort liability and to facilitate recovery. [Citation.]" *(Id.,* at p. 338.) The remedies provided for violations of the BIA were in many respects more "worker friendly" than traditional tort remedies. For example, under the FELA, violations of the BIA which result in injuries are negligent per se. (Fryer v. *St. Louis-San Francisco Ry. Co.* (1933) 333 Mo. 740, 63 S.W.2d 47.) The FELA statutorily established a right to sue for wrongful death where such a claim was not recognized by common law. *(St. Louis, I. Mtn. & S. Ry. Co. v. Hesterly (1913)* 228 U.S. 702.) Negligence of the employee was not a bar to recovery, but only reduced the amount of damages proportionately. Where the injury or death resulted from violations of the BIA or the Safety Appliance Act, even comparative fault was not a defense. (45 U.S.C. § 53.)

Moreover, we believe *Viad* draws the wrong conclusion from the absence of state tort remedies against manufacturers at the time the BIA was enacted. As *Viad* describes, in *Silkwood* and *Medtronic* the Supreme Court discerned a

congressional assumption that tort remedies would be available, based upon the existence of state tort remedies at the time the relevant legislation was enacted and the absence of any discernible legislative intent to eliminate those existing state law remedies. In contrast, when the BIA was enacted there existed no private right of action against a manufacturer. That right was established when the privity doctrine was repudiated in *MacPherson v. Buick Motor Co.* (1916) 217 N.Y. 382 [111 N.E. 1050], decided after enactment of the BIA, but 10 years before *Napier*. Strict liability of a manufacturer was not established until much later in the 1960's. *(Viad, supra,* at p. 338, citing *Greenman v. Yuba Power Products, Inc.* (1963) 59 Cal.2d 57, and *Vandermark v. Ford Motor Co.* (1964) 61 Cal.2d 256.) *Viad* reasons, "Because we find no intent to expressly preclude tort remedies against a manufacturer, we cannot say the field, which *Napier* found to be completely occupied, includes tort liabilities not contemplated at the time *Napier* was written." *(Id.* at p. 339.)

Unlike *Viad,* we cannot read the legislative history as evidencing a congressional intent to leave intact state tort remedies which at the time did not exist. Indeed, the opposite inference is easier to draw, particularly if the BIA is considered together with the FELA, which provides a federal remedy to injured employees.

Nor do we find the legislative history of either the MDA as examined in *Medtronic* or the Atomic Energy Act as examined in *Silkwood* remotely analogous to that of the BIA. Certainly there is no agency regulation under the BIA comparable to the FDA regulations relied upon in *Medtronic,* which narrowly interpret the preemptive scope of the law. Nor does any companion legislation, such as the Price Anderson Act in *Silkwood,* demonstrate congressional intent to leave existing state tort remedies intact.

Viad rejected the claim made here by GMC that because *Medtronic* and *Silkwood* involved very different statutes and subject matter ("field preemption" not even being an issue in

Medtronic) the analysis used in those cases was less applicable than that of *Napier*. "[T]he pronouncement by *Napier* that Congress has occupied the entire 'field' does not result in a completely different analysis. Whether the preemption is classified as express, field, or conflict does not change the ultimate determination of congressional intent. Indeed, as the California Supreme Court recently noted: 'The "three categories" of preemption . . . should not be taken to be "rigidly distinct. Indeed field pre-emption may be understood as a species of conflict pre-emption: A state law that falls within a pre-empted field conflicts with Congress' intent (either express or plainly implied) to exclude state regulation." . . .' *(Smiley v. Citibank* (1995) 11 Cal.4th 138, 148, fn. 3 . . . , citing *English v. General Electric Co., supra,* 496 U.S. at pp. 79-80, fn. 5 . . . .)" *(Viad, supra,* at p. 339.)

To say that a state law falling within a preempted field conflicts with Congress' intent to exclude state regulation is not to say that congressional intent to entirely occupy a field must be founded upon an actual conflict between the state regulation and a specific federal law or regulation, the inference that Viad appears to draw. Indeed, *Napier* is a prime example of a case wherein the Supreme Court explicitly noted the absence of any specific federal order, regulation or legislation regarding the particular devices at issue. *(Napier,* 272 U.S. 605, 609.) Nevertheless, congressional occupation of the entire field of locomotive equipment and safety preempted state regulation of those devices (automatic fire doors and cab curtains). It appears to us that *Viad* mistakenly conflates the categories of conflict preemption and field preemption, requiring demonstration of an actual conflict between an existing federal regulation concerning materials used in locomotives and the state tort claim. (See *Viad* at p. 340.)

Further, we believe *Viad* too lightly dismisses as "speculative" *(id.,* at p. 340) the impact of state tort actions and conflicting liability determinations upon locomotive design, manufacture and materials and upon the need for

national uniformity of regulations, given the interstate nature of railroads.

As recognized on several occasions by our United States Supreme Court, "'[state] regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy.' *San Diego Building Trades Council v. Garmon,* 359 U.S. 236, 247 (1959)." *(Cipollone v. Liggett Group, Inc., supra,* 505 U.S. 504, 521; accord, *Medtronic, Inc. v. Lohr, supra,* at p. 504, Breyer, J., concurring.) The effects of state agency regulation and a state tort suit are often identical. (See *Medtronic, Inc. v. Lohr, supra,* Breyer, J., concurring.) "Apart from compensating victims of accidents for their injuries, the purpose of tort liability is to induce defendants to conform their conduct to a standard of care established by the state. [Citation.]" *(Law, supra,* at p. 910.) A locomotive equipment manufacturer found to have negligently designed or manufactured a locomotive by including asbestos components or whose locomotives are found defective by virtue of their asbestos components is expected to modify that system to reduce the risk of injury. If the manufacturer fails to change its design or manufacture of the locomotive, it may in the next case be held liable for substantial punitive damages. If each state were to adopt different liability-triggering standards, conceivably manufacturers would be required to make different locomotives for different states and locomotive operators would be required to stop at state lines to adjust equipment or to switch locomotives. More likely, manufacturers would sell locomotives adhering to the standards set by the most stringent state. Congress's goal of uniform, federal railroad regulation would be undermined. (See *Law, supra,* pp. 910-911.)[9]

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[9] "This broad preemptive sweep is necessary to maintain uniformity of railroad operating standards across state lines. Locomotives are

There is no doubt that the Secretary of Transportation has authority to regulate the design of the locomotive and could order the elimination of asbestos in locomotive components. Imposing tort liability on railroad locomotive manufacturers clearly would affect "'the design, the construction, and the material' of locomotives." *(Napier, supra,* 272 U.S. at p. 611; *Law, supra,* at p. 911.) This effect on interstate commerce would be both "direct and substantial." *(English, supra,* at p. 85.) As *Law* explains, the imposition of tort liability on railroad equipment manufacturers would force them to conform to design and construction standards imposed by the states. "This would transfer the regulatory locus from the Secretary of Transportation to the state courts -- a result the BIA was clearly designed to foreclose. [Citation.]" *(Law, supra,* at pp. 911-912, fn. omitted.)

Our conclusion is supported by numerous state and federal lower court cases specifically addressing the preemption of state tort damage actions by the BIA. (E.g., *Springston v. Consolidated Rail Corp., supra,* 130 F.3d 241; *Missouri Pacific R.R. v. Railroad Com'n* (5th Cir. 1988) 850 F.2d 264, 268; *Marshall v. Burlington Northern Inc., supra,* 720 F. 2d 1149; *Carter v. Consolidated Rail Corp.,* 1998 WL 78749 (Ohio App. 10 Dist. Feb 10, 1998) (No. 97APE08-990); *In re Train Collision at Gary, Indiana* (Ind.App. 1996) 670 N.E.2d 902.) Although we recognize these cases are not

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designed to travel long distances, with most railroad routes wending through interstate commerce. The virtue of uniform national regulation 'is self-evident: locomotive companies need only concern themselves with one set of equipment regulations and need not be prepared to remove or add equipment as they travel from state to state.' *(Southern Pac. Transp. Co. v. Oregon PUC,* 9 F.3d 807, 811 (9th Cir. 1993); see also *R.J. Corman R.R .v. Palmore,* 999 F.2d 149, 152 (6th Cir. 1993) ('Th[e] lasting history of pervasive and uniquely-tailored congressional action indicates Congress's general intent that railroads should be regulated primarily on a national level through an integrated network of federal law.'). Any state law that undermines this regime is preempted by the BIA." *(Law, supra,* at p. 910.)

controlling,[10] we find them persuasive in their recognition of the broad preemptive sweep of the BIA as articulated by the Supreme Court in *Napier.*

We do not agree with *Viad* that *Medtronic* and *Silkwood* have undermined *Napier* and its analysis of the broad preemptive reach of the BIA. In the more than 70 years since *Napier* was decided, Congress has shown no indication that the Supreme Court did not in that case accurately represent congressional intent to completely occupy the field of "the design, the construction and the material of every part of the locomotive and tender and of all appurtenances." *(Id.* at p. 611.)

CONCLUSION

The lower court correctly found appellants' state tort causes of action preempted by the BIA and did not err in dismissing those actions. The judgments are therefore affirmed. Respondent is awarded its costs on appeal.

Kline, P.J.

We concur: Haerle, J.

Ruvolo, J.

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[10] California courts are not constrained by opinions of lower federal courts, even on federal questions. (See, e.g., *Service Employees Internat. Union v. County of Los Angeles* (1990) 225 Cal.App.3d 761,768.)

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ATTORNEYS FOR Defendant GENERAL MOTORS CORPORATION

CASE NO. 964534

NOTICE OF ENTRY OF JUDGMENT

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN FRANCISCO

ROBERT SCHEIDING and RAE SCHEIDING,
Plaintiffs,

vs.

ABEX CORPORATION; A & C INDUSTRIES; A. H. VOSS COMPANY; A.P. GREEN SERVICES; A.P. GREEN REFRACTORIES; A.W. CHESTERTON COMPANY; ACandS, INC; AETNA STEEL; ALLIED SIGNAL, INC.; ALTA BUILDING MATERIAL CO.; AMCORD, INC.; AMERICAN OPTICAL CORPORATION; AMERICAN MOTORS CORPORATION; AMERICAN PACIFIC ROOFING COMPANY; AMERICAN LOCOMOTIVE (AMLOC); AMERICAN ENERGY PRODUCTS CORP.; AMERICAN ASBESTOS COMPANY; APEX MECHANICAL; AQUA-CHEM, INC.; ARMCO, INC.; ARMSTRONG WORLD INDUSTRIES, INC.; ARNOT MARINE; ASARCO INCORPORATED; ASBESTOS CLAIMS MANAGEMENT CORPORATION; ASBESTOS CORPORATION LIMITED; ASBESTOS PRODUCT MANUFACTURING CORPORATION; ASBESTOSPRAY

CORPORATION; ASSOCIATED INSULATION OF CALIFORNIA; AUTO PARTS DISTRIBUTORS; BELL ASBESTOS MINES, LTD.; BENSON & ZIMMERMAN CO.; BIO CORPORATION; BIRCHFIELD BOILERS; BOILER AND WELDING WORKS; BORG-WARNER CORPORATION; BRENTON SAFETY, INC.; B.T. MANCINI CO., BURLINGTON NORTHERN RAILROAD COMPANY; C.S.HARDEMAN; CALAVERAS ASBESTOS, LTD.; CALAVERAS CEMENT COMPANY; CALIFORNIA SAFETY & SUPPLY COMPANY; CALIFORNIA STUCCO COMPANY; CALMAT COMPANY; CAPCO PIPE CO., INC.; CAPE INDUSTRIES, PLC; CARLISLE CORPORATION; CASSIAR ASBESTOS COMPANY, LTD.; CASSIAR MINING CORPORATION; CATERPILLAR, INC.; CBR CEMENT CORPORATION; CERTAIN-TEED CORPORATION; CHARLES AYERS; CHRYSLER CORPORATION; CITY LIGHTS; CLEAVER BROOKS; COEN COMPANY, INC.; COLONIAL SUGAR REFINING COMPANY; CONGOLEUM CORPORATION; CONSOLIDATED INSULATION, INC.; CROSSFIELD PRODUCTS CORPORATION; D. CUMMINS CORPORATION; DANA CORPORATION; DELAVAL STEAM TURBINE CO., aka TRANSAMERICA DELAVAL; DOUGLASS INSULATION CO., INC.; DRESSER INDUSTRIES, INC.; DRESSER-RAND CO.; DURABLA MANUFACTURING CO., INC.; DURAMETALLIC CORPORATION; DUTTON ASBESTOS & SUPPLY CO.; E.D.BULLARD COMPANY; E.H. O'NEILL COMPANY, INC.; ELLIOTT COMPANY; ERICSSON RADIO SYSTOMS, INC.; ERNEST A. JOHNSON; FIBERITE CORPORATION; FIBREX INC.; FIRESTONE TIRE & RUBBER CORPORATION; FITZGIBBONS; FLEXITALLIC, INC.; FLEXO PRODUCTS, INC.; FLINTKOTE COMPANY; FMC CORPORATION-TURBO PUMP OPERATION; FORD MOTOR COMPANY; FOSTER WHEELER CORPORATION; FRANKLIN OPTICAL COMPANY,

INC.; GAF CORPORATION; GARLOCK, INC.; GENCO INDUSTRIAL PRODUCTS; GENERAL ELECTRIC COMPANY; GENERAL MOTORS CORPORATION; GENERAL REFRACTORIES CO.; GENERAL VENEER MANUFACTURING COMPANY; GENTEX; GENUINE PARTS COMPANY; GOODYEAR TIRE AND RUBBER COMPANY; GOW SUPPLY; GRAYBAR ELECTRIC COMPANY; GRIFFIN WHEEL CO.; H & A CONSTRUCTION; HITCO; I.B. BENEDICT COMPANY; IDEAL BASIC INDUSTRIES, INC.; INGERSOLL-RAND COMPANY; INTERPACE CORP.; ISOTHERM; J.E. STEIGERWALD CO., INC.; J.T. THORPE, INC.; JIM WALTER CORP.; JOSHUA HENDY IRON WORKS; KAHR BEARING CORPORATION; KAISER GYPSUM COMPANY, INC.; KAISER CEMENT CORPORATION; KAISER ALUMINUM & CHEMICAL CORPORATION; KAISER REFRACTORIES; KEENE CORPORATION; KELLY-MOORE PAINT COMPANY, INC.; KENTILE FLOORS, INC.; KINGSBURY MACHINE WORKS, INC.; KUBOTA, LTD.; L.N.CURTIS & SONS; L.D.REEDER CO., INC.; LA HABRA STUCCO; LAKE ASBESTOS OF QUEBEC, LTD.; LEAR-SIEGLER, INC.; LOOMIS CORP.; LORAL CORPORATION; LORENTZEN CO.; LYNCH ASBESTOS; M. SLAYEN & ASSOC., INC.; M. H. DETRICK CO.; MacARTHUR COMPANY; MALOTT & PETERSON SUPPLYING; MAREMONT CORPORATION; METALCLAD INSULATION CORPORATION; METROPOLITAN LIFE INSURANCE COMPANY; MEXICO REFRACTORIES; MINE SAFETY APPLIANCES COMPANY; MINNESOTA MINING AND MANUFACTURING CO.; MITSUBISHI CEMENT CORP., LTD.; MOBAR INDUSTRIAL SUPPLY; MONOLITH PORTLAND CEMENT COMPANY; MOTOR PARTS DISTRIBUTORS, INC.; NAPA GLOVE COMPANY, INC.; NASCO AVIATION CORPORATION; NATIONAL REFRACTORIES and MINERAL CORPORATION; NATIONWIDE BOILERS; NATIONAL DYNAMICS; NAVISTAR INTERNATIONAL TRANSPORTATION

CORPORATION; NEBRASKA BOILER COMPANY; NOBLE AUTO PARTS; NORTH AMERICAN REFRACTORIES COMPANY; NORTH SAFETY; OAKFABCO, INC.; OCEAN SHORE IRON WORKS; OWENS-ILLINOIS, INC.; PACIFIC OCEAN BOILER; PACIFIC BOILERS; PACIFIC PUMP WORKS; PACIFIC WATER WORKS SUPPLY CO., INC.; PEDLEY-KNOWLES & CO.; PEERLESS CORPORATION; PETRO-CHEMICAL INSULATION CO.; PFIZER, INC.; PITTSBURGH CORNING CORP.; PLANT INSULATION CO.; PLUMBERS SUPPLY; POWER ENGINEERING & EQUIPMENT CO.; PULMOSAN SAFETY EQUIPMENT; QUAD C CORPORATION; QUIGLEY COMPANY, INC.; R.D. MINERS INC.; RAILWAY BRAKE PRODUCTS GROUP; RAPID-AMERICAN CORP.; REPUBLIC SUPPLY COMPANY; RICH-TEX, INC.; RIVERSIDE CEMENT COMPANY; ROCKWELL INTERNATIONAL CORPORATION; ROME CABLE CORPORATION; SANTA FE INTERNATIONAL; SELBY BATTERSBY & CO.; SEPCO CORPORATION; SLAKEY BROTHERS, INC.; SMITH-BLAIR INC.; SOUTHWESTERN PORTLAND CEMENT COMPANY; SPECIAL MATERIALS, INC.- WISCONSIN; SPRAYCRAFT CORPORATION; SPRAYON RESEARCH CORPORATION; STAR GLOVE & SAFETY PRODUCTS CORP.; STEEL GRIP SAFETY APPAREL CO.; STRUCTURAL COATING, INC.; STRUCTURAL FIREPROOFING, INC.; SYD CARPENTER, MARINE CONTRACTOR, INC.; TERRY STEAM TURBINE CO.; THE BUDD COMPANY; THE SYNKOLOID COMPANY; THE B.F. GOODRICH COMPANY; THE ANCHOR PACKING COMPANY; THE ROCKBESTOS COMPANY; THE OKONITE COMPANY; THETFORD MINES; THIOKOL CORP.; THOMAS DEE ENGINEERING COMPANY; THORPE INSULATION COMPANY; TOSHIBA INTERNATIONAL CORPORATION; TURNER-NEWALL, PLC; U.S. RADIATOR; UNION CARBIDE CORPORATION; UNION PACIFIC RAILROAD; UNITED

STATES GYPSUM COMPANY; UNITED STATES MINERAL PRODUCTS COMPANY; VAN ARSDALE-HARRIS LUMBER COMPANY; VANARCO; VAPOR CORPORATION; VICTOR EQUIPMENT COMPANY; VINE HILL HARDWARE; VOSS INTERNATIONAL CORP.; W.R. GRACE & CO. - CONNECTICUT; WAGNER ELECTRIC CORPORATION; WALDRON, DUFFY, INC.; WELSH CO.; WESTBURNE SUPPLY, INC. dba P.E. O'HAIR & CO.; WESTERN BUILDING MATERIALS CO.; WESTERN MacARTHUR CO.; WESTINGHOUSE ELECTRIC CORPORATION; WHEELER PROTECTIVE APPAREL, INC.; WILLIAMS AND RUSSO, INCORPORATED; WILLSON SAFETY PRODUCTS; THE SHERWIN-WILLIAMS COMPANY; UNIVERSAL FOODS CORP.; MACAULEY FOUNDRY, INC.; AMERICAN RUBBER COMPANY, INC.; SEA LAND SERVICE, INC.; PFIZER, INC.; BASIC VEGETABLE PRODUCTS; COLOMBO BAKING CO.; CADBURY BEVERAGES, INC.; BROWN & ROOT TECHNICAL SERVICES, INC.; DILLINGHAM CONSTRUCTION NA.A., INC.; FLOUR CORPORATION; THE RALPH M. PARSONS COMPANY; SOUTHERN PACIFIC TRANSPORTATION COMPANY; AMSTED INDUSTRIES; RAILROAD FRICTION PRODUCTS CORP.; TRINITY INDUSTRIES, INC.; VAPOR CORPORATION; WHEELABRATOR TECHNOLOGIES, INC.; TAY-HOLBROOK; ATLAS HEATING AND VENTILATING CO., LTD.; USX CORPORATION; CHEMICAL & INDUSTRIAL; D.W. NICHOLSON CORPORATION, DINWIDDIE CONSTRUCTION COMPANY; FRED J. EARLY; McGUIRE AND HESTER; MORRISON-KNUDSON CORPORATION; OSCAR E. ERICKSON, INC.; FOLEY—PMI, INC.; WISMER & BECKER; and FIRST DOE through THREE HUNDREDTH DOE, inclusive,

Defendants.

Hearing Date: 7/19/96
Time: 9:30 a.m.
Department: 10

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD HEREIN:

PLEASE TAKE NOTICE that on August 16, 1996, Judgment was entered in favor of defendant General Motors Corporation and against plaintiffs Robert Scheiding and Rae Scheiding. A copy of the judgment is attached hereto as Exhibit "A".

DATED: September 23, 1996

GRACE, SKOCYPEC, COSGROVE & SCHIRM
A Professional Corporation

By _____
CARL E. LOVELL
Attorneys for Defendant GENERAL MOTORS CORPORATION

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ATTORNEYS FOR Defendant GENERAL MOTORS CORPORATION

CASE NO. 964534

JUDGMENT

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN FRANCISCO

ROBERT SCHEIDING and
RAE SCHEIDING,

Plaintiffs,

vs.

ABEX CORPORATION; A & C INDUSTRIES; A. H. VOSS COMPANY; A.P. GREEN SERVICES; A.P. GREEN REFRACTORIES; A.W. CHESTERTON COMPANY; ACandS, INC; AETNA STEEL; ALLIED SIGNAL, INC.; ALTA BUILDING MATERIAL CO.; AMCORD, INC.; AMERICAN OPTICAL CORPORATION; AMERICAN MOTORS CORPORATION; AMERICAN PACIFIC ROOFING COMPANY; AMERICAN LOCOMOTIVE (AMLOC); AMERICAN ENERGY PRODUCTS CORP.; AMERICAN ASBESTOS COMPANY; APEX MECHANICAL; AQUA-CHEM, INC.; ARMCO, INC.; ARMSTRONG WORLD INDUSTRIES, INC.; ARNOT MARINE; ASARCO INCORPORATED; ASBESTOS CLAIMS MANAGEMENT CORPORATION; ASBESTOS CORPORATION LIMITED; ASBESTOS PRODUCT MANUFACTURING CORPORATION; ASBESTOS SPRAY CORPORATION; ASSOCIATED

INSULATION OF CALIFORNIA; AUTO PARTS DISTRIBUTORS; BELL ASBESTOS MINES, LTD.; BENSON & ZIMMERMAN CO.; BIO CORPORATION; BIRCHFIELD BOILERS; BOILER AND WELDING WORKS; BORG-WARNER CORPORATION; BRENTON SAFETY, INC.; B.T. MANCINI CO., INC.; BURLINGTON NORTHERN RAILROAD COMPANY; C.S.HARDEMAN; CALAVERAS ASBESTOS, LTD.; CALAVERAS CEMENT COMPANY; CALIFORNIA SAFETY & SUPPLY COMPANY; CALIFORNIA STUCCO COMPANY; CALMAT COMPANY; CAPCO PIPE CO., INC.; CAPE INDUSTRIES, PLC; CARLISLE CORPORATION; CASSIAR ASBESTOS COMPANY, LTD.; CASSIAR MINING CORPORATION; CATERPILLAR, INC.; CBR CEMENT CORPORATION; CERTAIN-TEED CORPORATION; CHARLES AYERS; CHRYSLER CORPORATION; CITY LIGHTS; CLEAVER BROOKS; COEN COMPANY, INC.; COLONIAL SUGAR REFINING COMPANY; CONGOLEUM CORPORATION; CONSOLIDATED INSULATION, INC.; CROSSFIELD PRODUCTS CORPORATION; D. CUMMINS CORPORATION; DANA CORPORATION; DELAVAL STEAM TURBINE CO., aka TRANSAMERICA DELAVAL; DOUGLASS INSULATION CO., INC.; DRESSER INDUSTRIES, INC.; DRESSER-RAND CO.; DURABLA MANUFACTURING CO., INC.; DURAMETALLIC CORPORATION; DUTTON ASBESTOS & SUPPLY CO.; E.D.BULLARD COMPANY; E.H. O'NEILL COMPANY, INC.; ELLIOTT COMPANY; ERICSSON RADIO SYSTOMS, INC.; ERNEST A. JOHNSON; FIBERITE CORPORATION; FIBREX INC.; FIRESTONE TIRE & RUBBER CORPORATION; FITZGIBBONS; FLEXITALLIC, INC.; FLEXO PRODUCTS, INC.; FLINTKOTE COMPANY; FMC CORPORATION-TURBO PUMP OPERATION; FORD MOTOR COMPANY; FOSTER WHEELER CORPORATION; FRANKLIN OPTICAL COMPANY, INC.; GAF CORPORATION; GARLOCK, INC.; GENCO

INDUSTRIAL PRODUCTS; GENERAL ELECTRIC COMPANY; GENERAL MOTORS CORPORATION; GENERAL REFRACTORIES CO.; GENERAL VENEER MANUFACTURING COMPANY; GENTEX; GENUINE PARTS COMPANY; GOODYEAR TIRE AND RUBBER COMPANY; GOW SUPPLY; GRAYBAR ELECTRIC COMPANY; GRIFFIN WHEEL CO.; H & A CONSTRUCTION; HITCO; I.B. BENEDICT COMPANY; IDEAL BASIC INDUSTRIES, INC.; INGERSOLL-RAND COMPANY; INTERPACE CORP.; ISOTHERM; J.E. STEIGERWALD CO., INC.; J.T. THORPE, INC.; JIM WALTER CORP.; JOSHUA HENDY IRON WORKS; KAHR BEARING CORPORATION; KAISER GYPSUM COMPANY, INC.; KAISER CEMENT CORPORATION; KAISER ALUMINUM & CHEMICAL CORPORATION; KAISER REFRACTORIES; KEENE CORPORATION; KELLY-MOORE PAINT COMPANY, INC.; KENTILE FLOORS, INC.; KINGSBURY MACHINE WORKS, INC.; KUBOTA, LTD.; L.N.CURTIS & SONS; L.D.REEDER CO., INC.; LA HABRA STUCCO; LAKE OF QUEBEC, LTD.; LEAR-SIEGLER, INC.; LOOMIS CORP.; LORAL CORPORATION; LORENTZEN CO.; LYNCH ASBESTOS; M. SLAYEN & ASSOC., INC.; M. H. DETRICK CO.; MacARTHUR COMPANY; MALOTT & PETERSON SUPPLYING; MAREMONT CORPORATION; METAL CLAD INSULATION CORPORATION; METROPOLITAN LIFE INSURANCE COMPANY; MEXICO REFRACTORIES; MINE SAFETY APPLIANCES COMPANY; MINNESOTA MINING AND MANUFACTURING CO.; MITSUBISHI CEMENT CORP., LTD.; MOBAR INDUSTRIAL SUPPLY; MONOLITH PORTLAND CEMENT COMPANY; MOTOR PARTS DISTRIBUTORS, INC.; NAPA GLOVE COMPANY, INC.; NASCO AVIATION CORPORATION; NATIONAL REFRACTORIES and MINERAL CORPORATION; NATIONWIDE BOILERS; NATIONAL DYNAMICS; NAVISTAR INTERNATIONAL TRANSPORTATION CORPORATION; NEBRASKA BOILER COMPANY;

NOBLE AUTO PARTS; NORTH AMERICAN REFRACTORIES COMPANY; NORTH SAFETY; OAKFABCO, INC.; OCEAN SHORE IRON WORKS; OWENS-ILLINOIS, INC.; PACIFIC OCEAN BOILER; PACIFIC BOILERS; PACIFIC PUMP WORKS; PACIFIC WATER WORKS SUPPLY CO., INC.; PEDLEY-KNOWLES & CO.; PEERLESS CORPORATION; PETRO-CHEMICAL INSULATION CO.; PFIZER, INC.; PITTSBURGH CORNING CORP.; PLANT INSULATION CO.; PLUMBERS SUPPLY; POWER ENGINEERING & EQUIPMENT CO.; PULMOSAN SAFETY EQUIPMENT; QUAD C CORPORATION; QUIGLEY COMPANY, INC.; R.D. MINERS INC.; RAILWAY BRAKE PRODUCTS GROUP; RAPID-AMERICAN CORP.; REPUBLIC SUPPLY COMPANY; RICH-TEX, INC.; RIVERSIDE CEMENT COMPANY; ROCKWELL INTERNATIONAL CORPORATION; ROME CABLE CORPORATION; SANTA FE INTERNATIONAL; SELBY BATTERSBY & CO.; SEPCO CORPORATION; SLAKEY BROTHERS, INC.; SMITH-BLAIR INC.; SOUTHWESTERN PORTLAND CEMENT COMPANY; SPECIAL MATERIALS, INC.- WISCONSIN; SPRAYCRAFT CORPORATION; SPRAYON RESEARCH CORPORATION; STAR GLOVE & SAFETY PRODUCTS CORP.; STEEL GRIP SAFETY APPAREL CO.; STRUCTURAL COATING, INC.; STRUCTURAL FIREPROOFING, INC.; SYD CARPENTER, MARINE CONTRACTOR, INC.; TERRY STEAM TURBINE CO.; THE BUDD COMPANY; THE SYNKOLOID COMPANY; THE B.F. GOODRICH COMPANY; THE ANCHOR PACKING COMPANY; THE ROCKBESTOS COMPANY; THE OKONITE COMPANY; THETFORD MINES; THIOKOL CORP.; THOMAS DEE ENGINEERING COMPANY; THORPE INSULATION COMPANY; TOSHIBA INTERNATIONAL CORPORATION; TURNER-NEWALL, PLC; U.S. RADIATOR; UNION CARBIDE CORPORATION; UNION PACIFIC RAILROAD; UNITED STATES GYPSUM COMPANY;

UNITED STATES MINERAL PRODUCTS COMPANY; VAN ARSDALE-HARRIS LUMBER COMPANY; VANARCO; VAPOR CORPORATION; VICTOR EQUIPMENT COMPANY; VINE HILL HARDWARE; VOSS INTERNATIONAL CORP.; W.R. GRACE & CO. - CONNECTICUT; WAGNER ELECTRIC CORPORATION; WALDRON, DUFFY, INC.; WELSH CO.; WESTBURNE SUPPLY, INC. dba P.E. O'HAIR & CO.; WESTERN BUILDING MATERIALS CO.; WESTERN MacARTHUR CO.; WESTINGHOUSE ELECTRIC CORPORATION; WHEELER PROTECTIVE APPAREL, INC.; WILLIAMS AND RUSSO, INCORPORATED; WILLSON SAFETY PRODUCTS; THE SHERWIN-WILLIAMS COMPANY; UNIVERSAL FOODS CORP.; MACAULEY FOUNDRY, INC.; AMERICAN RUBBER COMPANY, INC.; SEA LAND SERVICE, INC.; PFIZER, INC.; BASIC VEGETABLE PRODUCTS; COLOMBO BAKING CO.; CADBURY BEVERAGES, INC.; BROWN & ROOT TECHNICAL SERVICES, INC.; DILLINGHAM CONSTRUCTION NA.A., INC.; FLOUR CORPORATION; THE RALPH M. PARSONS COMPANY; SOUTHERN PACIFIC TRANSPORTATION COMPANY; AMSTED INDUSTRIES; RAILROAD FRICTION PRODUCTS CORP.; TRINITY INDUSTRIES, INC.; VAPOR CORPORATION; WHEEL ABRATOR TECHNOLOGIES, INC.; TAY-HOLBROOK; ATLAS HEATING AND VENTILATING CO., LTD.; USX CORPORATION; CHEMICAL & INDUSTRIAL; D.W. NICHOLSON CORPORATION, DINWIDDIE CONSTRUCTION COMPANY; FRED J. EARLY; McGUIRE AND HESTER; MORRISON-KNUDSON CORPORATION; OSCAR E. ERICKSON, INC.; FOLEY—PMI, INC.; WISMER & BECKER; and FIRST DOE through THREE HUNDREDTH DOE, inclusive,

Defendants.

On July 19, 1996, this court heard defendant General Motors Corporation's Motion for Summary Judgment, which it treated as a Motion for Judgment on the Pleadings and granted Without Leave to Amend. A copy of the court's July 24, 1996 Order is attached hereto as Exhibit "A". Based upon the court's July 24, 1996 Order, the court hereby enters judgment in favor of defendant General Motors Corporation and against plaintiffs ROBERT SCHEIDING and RAE SCHEIDING's entire complaint and action.

As part of this judgment, costs are hereby awarded to General Motors Corporation and against plaintiffs ROBERT SCHEIDING and RAE SCHEIDING.

DATED: 8/16, 1996

JUDGE OF THE SUPERIOR COURT

CALIFORNIA SUPERIOR COURT
CITY AND COUNTY OF SAN FRANCISCO
DEPARTMENT NUMBER TEN

NO. 964534

ROBERT SCHEIDING and RAE SCHEIDING,
Plaintiffs,

vs.

ABEX CORPORATION, GENERAL MOTORS CORPORATION, *et al.*,
Defendants.

ORDER GRANTING DEFENDANT GENERAL MOTORS CORPORATION'S MOTION FOR SUMMARY JUDGMENT

This matter came before this Court on July 19, 1996, the Honorable David A. Garcia presiding.

Having considered the briefs, declarations, exhibits and oral argument of the parties, **IT IS HEREBY ORDERED** that Defendant General Motors Corporation's motion for summary judgment or in the alternative summary adjudication shall be treated as a motion for judgment on the pleadings and is **GRANTED WITHOUT LEAVE TO AMEND.**

Dated: July 24, 1996

Hon. David A. Garcia
Judge of the Superior Court

CALIFORNIA SUPERIOR COURT
CITY AND COUNTY OF SAN FRANCISCO
DEPARTMENT NUMBER TEN

NO. 964534
CERTIFICATE OF SERVICE BY MAIL
(CCP 1013A(4))

ROBERT SCHEIDING and RAE SCHEIDING,
Plaintiffs,

vs.

ABEX CORPORATION, GENERAL MOTORS CORPORATION, *et al.*,
Defendants.

I, Benita J. Lee, a deputy clerk of the Superior

Court of the City and County of San Francisco, certify that:

1) I am not a party to the within action;
2) On July 24, 1996 I served the attached:

ORDER GRANTING DEFENDANT GENERAL MOTORS CORPORATION'S MOTION FOR SUMMARY JUDGMENT

by placing a copy thereof in a sealed envelope, addressed as following:

Steven J. Patti
BRAYTON HARLEY CURTIS
222 Rush Landing Road
P.O. Box 2109
Novato, CA 94948

Thomas H. Hutchinson
GRACE, SKOCYPEC,
COSGROVE & SCHIRM
444 S. Flower Street,
Suite 1100
Los Angeles, CA 90071

and,

3) I then placed the sealed envelope in the outgoing mail at 633 Folsom Street, San Francisco, CA, 94107 on the date indicated above for collection, attachment of required prepaid postage, and mailing on that date following standard court practice.

DATED: July 24, 1996

ALAN CARLSON, Clerk
By: Benita J. Lee
Deputy Clerk

PROOF OF SERVICE BY HAIL
(C.C.P. 2015.5)

I, the undersigned, am a citizen of the United States, a resident of the County of Los Angeles, State of California, over the age of eighteen years, and not a party to the within action.

I am employed by the Law Office of GRACE, SKOCYPEC, COSGROVE & SCHIRM, 444 South Flower Street, Suite 1100, Los Angeles, California 90036.

On August 15, 1996, I served the within JUDGMENT upon parties interested in said action by placing a true copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in a United States Postal Service box at Los Angeles, California, addressed as follows:

Francine S. Curtis, Esq.
BRAYTON, GISVOLD & HARLEY
999 Grant Avenue
P.O. Box 2109
Navato, California 94948

I DECLARE under penalty of perjury that the foregoing is true and correct.

Executed on August 15, 1996, at Los Angeles, California.

_____
SANDRA CONWAY

PROOF OF SERVICE BY MAIL
(C.C.P. §1013A AND §2015.5)

I, the undersigned, am a citizen of the United States, a resident of the County of Los Angeles, State of California, over the age of eighteen years, and not a party to the within action.

I am employed by the Law Offices of GRACE, SKOCYPEC, COSGROVE & SCHIRM, A Professional Corporation, 444 South Flower Street, Suite 1100, Los Angeles, Cal.ifornia 90071.

on September 25, 1996, I served the within NOTICE OF ENTRY OF JUDGMENT upon parties interested in said action by placing a true copies thereof, enclosed in a sealed envelope addressed as follows:

Francine S. Curtis, Esq. — Plaintiffs' Counsel
BRAYTON, GISVOLD & HARLEY — (415) 898-1555
222 Rush Landing Road
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_____
DONNA Y. THOMAS

First Appellate District, Division Two, No. A076324
50731 96

IN THE SUPREME COURT OF CALIFORNIA
HAND EN BANC

ROBERT SCHEIDING Et Al., Appellants

V.

GENERAL MOTORS CORPORATION,
Respondent And Companion Cases

SUPREME COURT FILED
APRIL 12, 2000
FREDERICK K. OHLRICH CLARK
DEPUTY

Petition for rehearing DENIED.

Mosk, is of the opinion the petition should be granted.

Chief Justice

UNITED STATES CODE ANNOTATED
TITLE 49. TRANSPORTATION
SUBTITLE V--RAIL PROGRAMS
PART A--SAFETY

CHAPTER 207--LOCOMOTIVES
Current through P.L. 106-170, approved 12-17-99

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§ 20701. Requirements for use

A railroad carrier may use or allow to be used a locomotive or tender on its railroad line only when the locomotive or tender and its parts and appurtenances—

(1) are in proper condition and safe to operate without unnecessary danger of personal injury;

(2) have been inspected as required under this chapter and regulations prescribed by the Secretary of Transportation under this chapter; and

(3) can withstand every test prescribed by the Secretary under this chapter.

§ 20702. Inspections, repairs, and inspection and repair reports

(a) General.--The Secretary of Transportation shall—

(1) become familiar, so far as practicable, with the condition of every locomotive and tender and its parts and appurtenances;

(2) inspect every locomotive and tender and its parts and appurtenances as necessary to carry out this chapter, but not necessarily at stated times or at regular intervals; and

(3) ensure that every railroad carrier makes inspections of locomotives and tenders and their parts and appurtenances as required by regulations prescribed by the Secretary and repairs every defect that is disclosed by an inspection before a defective locomotive, tender, part, or appurtenance is used again.

(b) Noncomplying locomotives, tenders, and parts.—

(1) When the Secretary finds that a locomotive, tender, or locomotive or tender part or appurtenance owned or operated by a railroad carrier does not comply with this chapter or a regulation prescribed under this chapter, the Secretary shall give the carrier written notice describing any defect resulting in noncompliance. Not later than 5 days after receiving the notice of noncompliance, the carrier may submit a written request for a reinspection. On receiving the request, the Secretary shall provide for the reinspection by an officer or employee of the Department of Transportation who did not make the original inspection. The reinspection shall be made not later than 15 days after the date the Secretary gives the notice of noncompliance.

(2) Immediately after the reinspection is completed, the Secretary shall give written notice to the railroad carrier stating whether the locomotive, tender, part, or appurtenance is in compliance. If the original finding of noncompliance is sustained, the carrier has 30 days after receipt of the notice to file an appeal with the Secretary. If the carrier files an appeal, the Secretary, after providing an opportunity for a proceeding, may revise or set aside the finding of noncompliance.

(3) A locomotive, tender, part, or appurtenance found not in compliance under this subsection may be used only after it is—

(A) repaired to comply with this chapter and regulations prescribed under this chapter; or

(B) found on reinspection or appeal to be in compliance.

(c) Reports.--A railroad carrier shall make and keep, in the way the Secretary prescribes by regulation, a report of every—

(1) inspection made under regulations prescribed by the Secretary; and

(2) repair made of a defect disclosed by such an inspection.

(d) Changes in inspection procedures.--A railroad carrier may change a rule or instruction of the carrier governing the inspection by the carrier of the locomotives and tenders and locomotive and tender parts and appurtenances of the carrier when the Secretary approves a request filed by the carrier to make the change.

§ 20703. Accident reports and investigations

(a) Accident reports and scene preservation.--When the failure of a locomotive, tender, or locomotive or tender part or appurtenance results in an accident or incident causing serious personal injury or death, the railroad carrier owning or operating the locomotive or tender—

(1) immediately shall file with the Secretary of Transportation a written statement of the fact of the accident or incident; and

(2) when the locomotive is disabled to the extent it cannot be operated under its own power, shall preserve intact all parts affected by the accident or incident, if possible without interfering with traffic, until an investigation of the accident or incident is completed.

(a) Investigations.--The Secretary shall—

(1) investigate each accident and incident reported under subsection (a) of this section;

(2) inspect each part affected by the accident or incident; and

(3) make a complete and detailed report on the cause of the accident or incident.

(c) Publication and use of investigation reports.--When the Secretary considers publication to be in the public interest, the Secretary may publish a report of an investigation made under this section, stating the cause of the accident or incident and making appropriate recommendations. No part of a report may be admitted into evidence or used in a civil action for damages resulting from a matter mentioned in the report.

Supreme Court, U.S.
FILED
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(2)

No. 00-316

In The

Supreme Court of the United States

ROBERT SCHEIDING, *et al.*,

Petitioners,

v.

GENERAL MOTORS CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of California

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF PARTIES

The Petition incorrectly describes the parties in the court below. *Goodyear* and *Hellquist* are wrongful death and survival suits. Harry Goodyear and Victor Hellquist were not parties. *See* App. 2a n.1.

Respondent General Motors Corporation was one of numerous defendants in the trial court. It was the respondent (appellee) in the California Court of Appeal and the California Supreme Court. Pursuant to Supreme Court Rule 29.6, GM states that it has no parent corporation and no publicly held company owns 10% or more of its stock.

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DISPUTED JURISDICTION

The Petition incorrectly states that this Court has jurisdiction under 28 U.S.C. § 1254 (certiorari to federal court of appeals). (Pet. 1) Any jurisdiction would arise under 28 U.S.C. § 1257(a) (certiorari to state court of last resort). We respectfully submit, however, that the Court should decline to find jurisdiction because the Petition was not timely filed.

Absent a valid extension of time, a petition for a writ of certiorari must be filed within 90 days after the state court of last resort, having decided the case, denies rehearing. 28 U.S.C. §§ 2101(c), 2104; Supreme Court Rule 13.1, 13.3. The California Supreme Court denied rehearing April 12. The petition was filed over 90 days later on August 24. Accordingly, it is out of time unless the time was validly extended.

Petitioners applied to Justice O'Connor to extend the time to petition for a writ of certiorari. However, in violation of the Supreme Court Rules, GM never received service of any extension request, nor was a certificate of service filed with the extension request. *See* Supreme Court Rule 30 ("application to extend time to file a petition for writ of certiorari . . . shall be made to an individual justice and . . . served on all other parties"); 22 (application to individual justice "shall be accompanied by proof of service"); 29.5 ("proof of service, when required by these Rules, shall accompany the document

when it is presented to the Clerk for filing").[1] GM accordingly had no knowledge of the application, much less opportunity to respond.

Apparently unaware of the application's defect, the Court granted the extension. The order granting the extension was again not served on GM and GM did not know about it. GM was surprised to receive a Petition filed August 24, well over 90 days after the California Supreme Court's denial of rehearing. We respectfully submit that a Petition filed late, under an extension procured by stealth and in violation of the rules, should not be deemed timely.

SUMMARY OF ARGUMENT

As explained in the jurisdiction discussion above, the petition was filed more than 90 days after denial of the Petition for Rehearing, and there was no valid extension of time because the application for extension was not served. Accordingly, the Petition should be denied as untimely. Petitioners should not be rewarded for violation of rules grounded in fundamental fairness by consideration of the Petition.

There is no issue warranting review in any event. *Napier v. Atlantic Coast R.R.*, 272 U.S. 605, 611, 613 (1926),

[1] The Office of the Clerk of this Court confirmed to GM's counsel that there is no certificate of service of the application in the Court file.

holds that the Locomotive Inspection Act ("LIA"),[2] 49 U.S.C. §§ 20701-20903, occupies the field of all matters "within the scope of the authority delegated to" the Secretary of Transportation – including "the design, the construction and the material of every part of the locomotive and of all appurtenances." LIA therefore preempts any state law within that field. Whether federal regulators have addressed the matter, *Napier* holds, "is without legal significance." *Id.* Congress occupied the field to preclude state-by-state variations in law respecting locomotives and their parts and appurtenances. Otherwise, railroads would have to change locomotives and their parts as trains crossed state lines – or conform them everywhere to the rule of the most exacting state – a burden Congress deemed intolerable. Petitioners [illegible]d the court below *Napier* was "good law" and repeat here that they "do not disagree" that it holds LIA "occupies the field of regulating locomotive equipment." (Pet. 6)

That disposes of this case. Petitioners' state law claims attack the "design" and "material," *Napier*, 272 U.S. at 611, of locomotive components. They accordingly fall squarely within the Secretary's authority, and so within the preempted field. That is true, under *Napier*, whether the federal regulators have addressed asbestos (they have) or not. That is true, under a long line of this Court's precedent, whether the state law under which the duty imposed is common law or not. That is true, every appellate court to address the question holds, whether the claim is made against the railroad operator or the

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[2] LIA was formerly known as the Locomotive Boiler Inspection Act, "LBIA" or "BIA".

manufacturer. For LIA speaks to "manufacturer[s] . . . of railroad equipment"; the preempted field is defined by the Secretary's authority and includes the "design" and "construction" of the locomotive and its parts, *id.*; the manufacturers who design and construct locomotives are accordingly at the center of that field; and as a practical matter state law imposing duties on manufacturers must be preempted, lest the uniformity federal law is designed to achieve be destroyed.

The California Supreme Court simply followed this Court's mandate in *Napier*, agreeing with a summary affirmance by this Court and every federal court of appeals or state court of last resort to reach these issues. *Law v. General Motors Corp.*, 114 F.3d 908 (9th Cir. 1997) (state could not impose failure-to-warn or design-defect liability, because warnings and designs are "within the scope of the Secretary's authority"; "Congress intended federal law to occupy the field of locomotive equipment and safety, particularly as it relates to injuries suffered by railroad workers in the course of their employment"); *First Security Bank v. Union Pac. R.R.*, 152 F.3d 877, 880-81 (8th Cir. 1998) (LIA preempts common-law action claiming that locomotive horn should be louder); *Springston v. Consol. Rail Corp.*, 130 F.3d 241, 245 (6th Cir. 1997) (states cannot impose liability for failure to install warning devices on locomotives because they are "within the scope of the authority of the [Secretary]") (citation omitted), *cert. denied*, 523 U.S. 1094 (1998); *Oglesby v. Delaware & Hudson Ry.*, 180 F.3d 458 (2d Cir. 1999) (LIA preempts common-law action claiming locomotive seat should be designed differently and accompanied by warning), *cert.*

denied, 120 S. Ct. 498 (1999); *Marshall v. Burlington Northern, Inc.*, 720 F.2d 1149, 1152 (9th Cir. 1983) (Kennedy, J.) (LIA preempts common-law claim for failure to install device "within the scope of the Secretary's authority to prescribe"; "[f]ederal regulation of locomotive equipment under the [LIA] has been held a total occupation of the field, preventive of any state or local regulation on the same subject"); *Missouri Pac. R.R. v. Railroad Comm.*, 850 F.2d 264, 268-69 (5th Cir. 1988) (LIA preempts state requirement for telemetry devices), *cert. denied*, 488 U.S. 1009 (1989). Indeed, a New York trial court has recently held that LIA preempts asbestos claims – to our knowledge the only reported decision outside California respecting preemption of asbestos claims. *Seaman v. A.P. Green Indust., Inc.*, 707 N.Y.S.2d 299 (N.Y. Sup. Ct. 2000).

Petitioners claim five state courts disagree. But they cite only four decisions, and those decisions are so far afield that petitioners did not even cite them below. Every supposedly conflicting case they cite has been superseded, is off point, or both. None supports the holes petitioners try to poke in *Napier*'s field.

In sum, plaintiffs do not challenge *Napier*, or LIA's field preemption, nor identify any on-point appellate case that quarrels with *Napier*'s application on the facts here. No court – none – has reached a holding that would allow petitioners' claims. There is nothing to review.

REASONS FOR DENYING THE PETITION

Napier v. Atlantic Coast Line Railroad, 272 U.S. 605, 611-13 (1926), holds that LIA grants federal regulators – the Interstate Commerce Commission and now its successor, the Secretary of Transportation, via the Federal Railroad Administration (FRA)[3] – exclusive authority over "the design, the construction and the material of every part of the locomotive and tender and of all appurtenances." *Id.* at 611. Accordingly, LIA "occup[ies] the field" as to matters within federal authority under it, and so preempts all state law respecting matters in that field. The Court explained that state law "within the scope of the authority delegated to the Commission" by LIA, *id.*, is preempted regardless whether it also conflicts with a federal rule, or whether there is any applicable federal rule at all:

> ***It is also urged that, even if the Commission has power to prescribe*** an automatic firebox door and a cab curtain, ***it has not done so; and that it has made no other requirement inconsistent with the state legislation. This, also, if true, is without legal significance.*** The fact that the Commission has not seen fit to exercise its authority to the full extent conferred, has no bearing upon the construction of the Act delegating the power. We hold that state legislation is precluded, because [LIA] as we construe it,

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[3] In 1966, the power originally granted to the ICC was transferred to the Secretary of Transportation. Department of Transportation Act, Pub. L. 89-670, § 6(e)(1), 80 Stat. 931 (1966). *See generally Marshall*, 720 F.2d at 1192. The FRA, a part of the Transportation Department, exercises this power. 49 C.F.R. § 1.49(c)(5), (g).

> was intended to occupy the field. The broad scope of the authority conferred upon the commission leads to that conclusion. . . . [R]equirements by the States are precluded, however commendable or however different their purpose.

Id. at 613 (emphasis added). The remedy, the Court held, for inadequate federal regulation was not state law, but a petition to the federal regulatory authority: "[i]f the protection now afforded by the Commission's rules is deemed inadequate, application for relief must be made to it." *Id.*

The reason for field preemption: locomotives must cross state lines routinely, so the subject "is peculiarly one that calls for uniform law." *See Pennsylvania R.R. v. Pub. Serv. Comm.*, 250 U.S. 566, 569 (1919) (Holmes, J.) (mail cars).

> This broad preemptive sweep is necessary to maintain uniformity of railroad operating standards across state lines. Locomotives are designed to travel long distances . . . through interstate commerce. The virtue of uniform national regulation "is self-evident: locomotive companies need only concern themselves with one set of equipment regulations and need not be prepared to remove or add equipment as they travel from state to state."
>
> * * *
>
> If each state were to adopt different liability-triggering standards, manufacturers would have to sell locomotives and cars whose equipment could be changed as they crossed state lines, or adhere to the standard set by the most stringent

> state. Either way, Congress's goal of uniform, federal railroad regulation would be undermined.

Law, 114 F.3d at 910-11 (quoting *Southern Pac. Transp. Co. v. Oregon Pub. Util. Comm.*, 9 F.3d 807, 811 (9th Cir. 1993)); *accord* App. 4a; *Oglesby*, 180 F.3d at 461; *Marshall*, 720 F.2d at 1153; *First Security*, 152 F.3d at 880-81; *Springston*, 130 F.3d at 245. *Cf. United States v. Locke*, 120 S. Ct. 1135, 1149 (2000) ("Enforcement of the state requirements would . . . frustrate the evident congressional intention to establish a uniform federal regime controlling the design of oil tankers.") (citation omitted).

Indeed, Congress judged that uniform, expert, federal regulation was best calculated to promote locomotive safety, and that piecemeal regulation would be disruptive. As the FRA explained:

> [I]t is essential that the safety of railroad operations be the responsibility of a single agency and that that agency undertake new initiatives in an informed and deliberate fashion, weighing the impact of particular proposals on long-standing industry practices and pre-existing regulations. . . . ¶ [I]t is the judgment of the agency that piecemeal regulation of individual hazards . . . by any other agency of government would be disruptive and contrary to the public interest.

Railroad Occupational Safety and Health Standards; Termination 43 Fed. Reg. 10,583, 10,585-86 (1978). Thus, LIA leaves no room for ad hoc jury decisions about locomotives, their parts and use:

> There is a multitude of mechanical questions involved in determining the proper construction, maintenance and use of the boilers, other parts of locomotives, their tenders and appurtenances, all of which are covered by the Boiler Inspection Act, as amended. Inventions are occurring frequently and there are many devices to accomplish the same purpose. Comparative merits as to safety or utility are most difficult to determine. ***It is not for the courts to lay down rules which will operate to restrict the carriers in their choice of mechanical means by which their locomotives, boilers, engine renders and appurtenances are to be kept in proper condition. Nor are such matters to be left to the varying and uncertain opinions and verdicts of juries.***

Baltimore & Ohio R.R. v. Groeger, 266 U.S. 521, 530 (1925) (emphasis added); *see* App. 10a-11a.[4]

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[4] Congress also provided a potent remedy for on-the-job injuries that "doesn't undermine the BIA's goal of uniformity." *Law*, 114 F.3d at 912. That remedy is a Federal Employers' Liability Act suit. 45 U.S.C. § 51 *et seq.* In a FELA action, LIA imposes "upon the carrier an absolute and continuing duty to maintain the locomotive, and all parts and appurtenances thereof, in proper condition, and safe to operate in active service without unnecessary peril," *Southern Ry. v. Lunsford*, 297 U.S. 398, 401 (1936), and proof of a violation of this duty "is effective to show negligence as a matter of law." *Urie v. Thompson*, 337 U.S. 163, 189 (1949). Petitioners thus go down the wrong track in suggesting LIA should permit liability because it has sometimes been viewed as an amendment to FELA. (Pet. 17) FELA, not a patchwork of state claims, is how Congress intended injured employees to be compensated. Petitioners here brought FELA claims against their employer.

Napier's field preemption holding has been reaffirmed repeatedly by this Court. *See, e.g., United States v. Baltimore & Ohio R.R.*, 293 U.S. 454, 461 (1935) (*Napier* holds that LIA occupies the field); *Urie v. Thompson*, 337 U.S. 163, 192 (1949) (same). Indeed, petitioners conceded below that *Napier* was "good law"[5] and repeat here that they "do not disagree" that *Napier* holds that LIA "occupies the field of regulating locomotive equipment." (Pet. 6)

Petitioners in this case, railroad workers, claim that "asbestos materials" in GM's locomotives and locomotive parts (plus 199 other defendants' asbestos) caused them to contract asbestos-related illnesses,[6] and, proceeding on various state law tort theories such as strict liability, claim that the locomotives and their parts were defective in design because they contained asbestos. The California Supreme Court found those claims preempted. (App. 5a-6a) Its analysis applied *Napier* according to its terms, was absolutely right, and in accord with the law around the country.

The preempted field includes "the design, the construction and the material of every part of the locomotive . . . and of all appurtenances."[7] The asbestos-

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[5] *See* Supplemental Opening Brief in California Supreme Court, at 5 n.2.

[6] Plaintiffs Goodyear and Hellquist claim wrongful death. The preemption analysis is the same whether the suit is brought by the employee or a survivor, so we refer to the employees in all cases as "petitioners."

[7] Thus, for example, LIA preemption covers: warnings, engines, brakes and insulation, *Law*, 114 F.3d at 909-10; speed recorders and indicators, *Consolidated Rail Corp. v. Pennsylvania*

containing components whose design petitioners challenge – insulation, steam generators, exhaust stacks, motors, and others – are locomotive "parts" and "appurtenances." Therefore, their design and materials are within the Secretary's authority and the preempted field. Indeed, the Secretary has issued and considered regulations respecting them, under authority of LIA, underscoring that they are within the Secretary's authority. Federal regulations under LIA govern, *inter alia*, insulation (49 C.F.R. §§ 229.25(b), 229.89, 229.41, 229.83[8]), motors (49

Pub. Util. Comm. 461 U.S. 912 (1983) (mem.), *aff'g*, 696 F.2d 981 (3d Cir. 1982), *aff'g*, 536 F. Supp. 653, 655 (E.D. Pa. 1982); warning lights and reflective tape, *Springston*, 130 F.3d at 243-45; *Marshall*, 720 F.2d at 1152; *Furlough v. Union Pac. R.R. Co.*, ___ So.2d ___, 2000 WL 1230592 (La.App. Aug. 31, 2000); *Carter v. Consolidated Rail Corp.* (Ohio App. 1998) 709 N.E.2d 1235, 1240, *app. denied*, 694 N.E.2d 75 (Ohio 1998); *Cates v. Consolidated Rail Corp.*, 653 N.E.2d 1229, 1236 (Ohio App. 1995), *app. denied*, 649 N.E.2d 839 (Ohio 1995); horns, *First Sec.*, 152 F.3d at 880-81; fire extinguishers and first-aid kits, *Missouri Pac. R.R. v. Railroad Comm.*, 833 F.2d 570, 576 (5th Cir. 1987); bell ringers, *Hines v. Smith*, 275 F. 766, 767 (7th Cir. 1921); radios, *Green v. River Terminal Ry.*, 585 F. Supp. 1019, 1027 (N.D. Ohio 1984), *aff'd*, 763 F.2d 805 (6th Cir. 1985); and of course fire boxes and cab curtains, *Napier*, 272 U.S. at 611-13. It also covers asbestos claims. *Seaman*, 707 N.Y.S.2d at 299. In short, "virtually all state regulations affecting the train itself appear preempted by federal law." *Missouri Pac. R.R.*, 850 F.2d at 268.

[8] Federal regulation of locomotive insulation in fact extends back before petitioners began working on locomotives in the 1940's. *See, e.g.*, former 49 C.F.R. § 91.16 (1939) ("lagging" [insulation] on boilers must be removed every five years); 49 C.F.R. § 91.254 (1939) ("a careful inspection of all visible insulation . . . shall be made and all defects repaired"); 49 C.F.R. § 91.253 (1939) (electrical insulation must be tested at least annually).

C.F.R. § 229.91, 229.93-101), the electrical system (49 C.F.R. §§ 229.77-91), exhaust stacks (49 C.F.R. § 229.43(a)), steam generators (49 C.F.R. § 229.103-113), brakes (49 C.F.R. §§ 229.46-59), and the cab itself. (49 C.F.R. § 229.115-135).[9] Asbestos in those components is accordingly within the Secretary's authority too. Indeed, as petitioners acknowledge, the FRA considered asbestos regulation – confirming FRA's authority over locomotive asbestos – and decided to "take no regulatory action."[10] (Pet. 14 [emphasis omitted]) Since petitioners' claims attack locomotive parts' design and materials, the California Supreme Court held, the claims fall within the field and are preempted. (App. 5a-6a)

That was hardly new or radical. The decision below accords with a summary affirmance by this Court and every federal court of appeals or state court of last resort to reach the issue – including several petitioners do not mention. (*See* Pet. 10-11) *Consolidated Rail Corp. v. Pennsylvania Pub. Util. Comm.*, 536 F. Supp. 653, 655 (E.D. Pa.),

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[9] They were also adopted under authority of the Federal Railroad Safety Act (49 U.S.C. §§ 20101-20144 ("FRSA"). *See* 49 C.F.R. § 229, Authority note (citing both LIA and FRSA sections of 49 U.S.C.).

[10] The Federal Railroad Administration determined that "there is no evidence that the presence of asbestos [in old locomotives] poses a problem to humans," that no "action with respect to the presence of asbestos in locomotive cabs is warranted," that existing Occupational Safety and Health Administration regulations were adequate "to ensure effective long-term management of asbestos," and that accordingly "no action be taken on the issue of asbestos in locomotives." Federal Railroad Administration, *Locomotive Crashworthiness and Cab Working Conditions* at 10-11 (1996).

aff'd, 696 F.2d 981 (3d Cir. 1982), *aff'd*, 461 U.S. 912 (1983) (mem.); *Marshall*, 720 F.2d at 1152; *Law*, 114 F.3d at 908; *First Security*, 152 F.3d at 880-81; *Springston*, 130 F.3d at 245; *Oglesby*, 180 F.3d at 458; *Missouri Pacific.*, 850 F.2d at 268-69; *Missouri Pac. R.R. v. Railroad Comm.*, 833 F.2d 570, 576 (5th Cir. 1987); *Mickleson v. Montana Rail Link, Inc.*, 999 P.2d 985, 997 (Mont. 2000). *See also Seaman*, 707 N.Y.S.2d at 299 (LIA preempts asbestos claims).

Petitioners stretch to conjure conflict and to poke holes in LIA's field, but the arguments are tortured, and ultimately reveal a misunderstanding of preemption.

A. There Is No Conflict Among The Lower Appellate Courts.

Petitioners advise the decision below conflicts with "at least five" state-court decisions. They only cite four. (Pet. 11-12) Anyway, the conflict is contrived; indeed, petitioners did not even cite these cases to the courts below. All the decisions are superseded or off-point, or both; none involves asbestos; and all are 20 or more years old. They certainly have caused no confusion at all: there are two decades of unanimous circuit and state supreme court decisions starting with Justice (then Judge) Kennedy's decision in *Marshall*, 720 F.2d at 1152. The decision below, far from "increas[ing] the confusion" (Pet. 9), is in line with all of them.

We address briefly petitioners' supposedly conflicting cases:

> ***Henry v. District Court*, 645 P.2d 1350 (Mont. 1982), *appeal dismissed*, 457 U.S. 1101 (1982)** (cited in Pet. 11): *Henry* did not address field

preemption or even cite *Napier*.[11] The case from Montana that does – the decision this year in *Mickleson*, 999 P.2d at 997 – holds that LIA preempts a common law claim "within the scope of the authority delegated to the [Secretary of Transportation]." (following *Marshall*.). Petitioners omit that.

***Norfolk and Western Railway Company v. Pennsylvania Public Utility Commission*, 413 A.2d 1037 (Penn. 1980), and *Washington v. Chicago, Milwaukee, St. Paul & Pacific Railroad Co.*, 484 P.2d 1146 (Wash. 1971)**: These cases held the Federal Railroad Safety Act (49 U.S.C. §§ 20101-20144) ("FRSA") and its legislative history repealed LIA's field preemption. Even petitioners do not endorse that reasoning here, for they agree that *Napier* is "good law" and LIA "occupies the field." This Court summarily affirmed a district-court case that found both FRSA conflict preemption[12] and that as

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[11] Plaintiff in *Henry* alleged that a railroad was negligent under state law in not equipping its locomotive with an oscillating headlight and strobe light. 645 P.2d at 1350. The court discussed preemption only under another act, the Federal Railroad Safety Act, and did not discuss LIA or even cite *Napier*. 645 P.2d at 1351, 1352. This Court lacked jurisdiction to correct the error. *Burlington Northern, Inc. v. Henry*, 457 U.S. 1101 (1982) (dismissing appeal).

[12] FRSA is not limited to locomotives, but broadly authorizes the Secretary of Transportation (through FRA) to issue regulations in the area of railroad safety generally. FRSA expressly preempts every state "law, regulation, or order," including "legal duties imposed . . . by the common law," relating to railroad safety where a federal regulation "cover[s] the subject matter of the State requirement." 49 U.S.C. § 20106; *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658, 664 (1993).

to locomotives, LIA – alive and well – "completely preempts the field of locomotive equipment." *Consolidated Rail Corp. v. Pennsylvania Pub. Util. Comm.*, 536 F. Supp. 653, 655 (E.D. Pa.), *aff'd*, 696 F.2d 981 (3d Cir. 1982), *aff'd*, 461 U.S. 912 (1983) (mem.); *see* App. 6a-7a (explaining *Consolidated Rail*).[13] To our knowledge every case, state or federal, in the last 20 years agrees. *Marshall*, 720 F.2d at 1153 (FRSA expressly left LIA "intact, including its preemptive effect"); *Springston*, 130 F.3d at 245; *Oglesby*, 180 F.3d at 462; *Law*, 114 F.3d at 912 n.4; *Scheiding v. General Motors Corp.*, App. 6a; *Furlough v. Union Pac. R.R. Co.*, ___ So.2d ___, 2000 WL 1230592 (La. App. Aug. 31, 2000), *Carter v. Consol. Rail Corp.*, 709 N.E.2d 1235, 1240 (Ohio App. 1998), *app. denied*, 694 N.E.2d 75 (Ohio 1998).[14]

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[13] That summary affirmance has precedential force. *Hicks v. Miranda*, 422 U.S. 332, 344 (1975).

[14] Congress has approved this Court's finding of LIA's field preemption. In 1970, Congress overhauled other aspects of railroad law but found LIA and five other laws "have served well" and "chose to continue them without change." (H.R. Rep. No. 91-1194, *reprinted in* 1970 U.S.C.C.A.N. 4104, 4105, 4108) (accompanying Federal Railroad Safety Act, 49 U.S.C. §§ 20101-20144). It specifically noted that under those approved laws, "where the Federal Government has authority, with respect to rail safety, it preempts the field." *Id. See Marshall*, 720 F.2d at 1153. And in 1994, when Congress recodified LIA without substantive change, it specifically declined to "impair [ ] the precedent value of earlier decisions." H.R. Rep. No. 103-180, at 5 *reprinted in* 1994 U.S.C.C.A.N. at 822. Congress in recodifying the law thus "was aware of . . . earlier judicial interpretations and, in effect, adopted them." *Keene Corp. v. United States*, 508 U.S. 200, 212 (1993); *Lorillard v. Pons*, 434 U.S. 575, 580 (1978).

> *Penn Central Co. v. Department of Public Utilities*, 253 N.E.2d 339 (Mass. 1969). This case stated that emergency tools and emergency lights fell outside LIA's preempted field, so state law could regulate them. *Penn Central*, 253 N.E.2d at 344. Right or wrong, that statement is off point. Petitioners do not dispute that the parts at issue here – such as motors, exhaust stacks, insulation, and brake shoes – fall squarely within LIA's field.

Thus, none of the cases petitioners cite really is on point, much less creates a conflict with current law, let alone support the holes petitioners try to poke in LIA's preempted field. We turn to those holes.

B. The First Hole: Preemption Only Where The Federal Regulators Have Acted.

Petitioners question whether LIA's field preemption covers state law "in areas where the federal government has not regulated the subject matter." They urge that federal law does not address asbestos, and reason that states may enter the preempted field as long as they do not "conflict with" federal regulations. (Pet. 14-16) The argument overlooks that FRA in fact has considered asbestos (n.10, above), but more fundamentally, confuses "field" and "conflict" preemption.

By definition, field preemption preempts all state law in the field whether the federal authority has been exercised or not. *Napier* itself explains. There, the ICC had not regulated fireboxes or cab curtains. States argued they could regulate because the ICC had not. This Court

responded: "This also, if true, is without legal significance. The fact that the Commission has not seen fit to exercise its authority to the full extent conferred, has no bearing" because LIA occupies the field. *Napier,* 272 U.S. at 613. *Napier* thus belies petitioners' claim that decisions finding preemption must involve subjects "expressly regulated" by federal law. (Pet. 10) *See also Oglesby,* 180 F.3d at 461 (the "relevant question" for LIA field preemption "is not whether the federal government has exercised its authority [to regulate the subject of the claim] but whether it possesses the power in the first place"; claim re warnings on seats preempted where seats within federal authority, even where federal regulators had no specific seat warning regulations); *accord Springston,* 130 F.3d at 245 (same); *Law,* 114 F.3d at 910 (same); *Missouri Pac. R.R.,* 833 F.2d at 577 (state law respecting locomotive first aid kits and fire extinguishers preempted because LIA "wholly occupies the field of regulation of locomotive equipment"; no mention of on-point federal regulation).[15]

Thus "conflict" (Petition at 14) – the test for conflict, not field, preemption – has no place in a field preemption case. In *Napier,* states defended their laws against field preemption because they were not "inconsistent with" any federal requirement. This Court found field preemption even without any conflict – or even any regulation. 272 U.S. at 613. That is what field preemption means. *See*

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[15] Some of these cases cited regulations to help show that plaintiffs' claims were "within the scope of the Secretary's authority" and so preempted. *E.g., Law,* 114 F.3d at 911. None suggested that state law may invade the field whenever federal regulators have decided not to regulate a subject – a proposition *Napier* plainly rejects. *See also* App. 13a.

also Missouri Pac. R.R. v. Porter, 273 U.S. 341, 346 (1927) (state law "cannot be applied in coincidence with, as complementary to or as in opposition to, federal enactments" that occupy the field); *Locke,* 120 S. Ct. at 1151 (state law cannot enter preempted field even if allegedly "similar" or "supplement[ary]" to federal law, because federal regulators are "the sole source" of law). By definition, state law in the federal field conflicts with Congress' intent to keep state law out. *English v. General Elec. Co.,* 496 U.S. 72, 79-80 n.5 (1990). Petitioners urge that the case summarily affirmed by this Court – *Consolidated Rail,* 536 F. Supp. at 656-57 – found LIA preemption "because that equipment was the subject of federal regulations." (Pet. 11) Not so. The court held that LIA "preempts the field." *Consolidated Rail,* 536 F. Supp. at 655. Petitioners confuse that with the court's separate analysis concerning a different Act (FRSA) and conflict preemption under it, which does require an on-point federal regulation. *See CSX Transp., Inc. v. Easterwood,* 507 U.S. 658 (1993). *See* App. 12a-13a.

Petitioners' protest that the California Supreme Court ignored a "presumption against preemption." (Pet. 13) But as this Court held last term, no such presumption arises "when the State regulates in an area where there has been a history of significant federal presence." *Locke,* 120 S. Ct. at 1147-48. That is this case. Railroads have been "subject to comprehensive federal regulation for nearly a century" and there is "no comparable history of long-standing state regulation . . . of the railroad industry." *United Transp. Union v. Long Island R. R. Co.,* 455 U.S. 678, 687 (1982); *see* App. 12a. In any event, there is no

occasion for any such presumption where *Napier* already holds that LIA occupies the field. (App. 11a-12a)

Petitioners' confusion about the difference between field preemption and conflict preemption is no ground for review.

C. The Second Hole: Common-Law Claims Against Manufacturers.

Petitioners posit that *Napier*'s field does not include state regulation exercised through tort law, and that common law should be immune to preemption. (Pet. 16) They also argue that *Napier*'s field does not include state law directed at manufacturers. Both arguments again overlook the meaning of field preemption, and the unanimous case law supporting the California Supreme Court.

This Court has long held that preemption fully applies to common-law duties: "[R]egulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy." *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 246-47 (1959). The Court has reaffirmed that rule earlier this year. *Geier v. American Honda Motor Co.*, 120 S. Ct. 1913, 1925-26 (2000) (products liability claim preempted). *Accord Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 521-23 (1992) ("[c]ommon law damage actions" are "premised on the existence of a legal duty," and so impose "requirements or prohibitions"; quoting *Garmon* with approval); *CSX Transportation*, 507 U.S. at 675 (Federal Railroad Safety Act preempts negligence claim);

International Paper Co. v. Ouellette, 479 U.S. 481, 491-500 (1987) (common-law nuisance claims preempted).

The California Supreme Court, like every federal circuit court to consider the issue, found petitioner's common law claims, since within the occupied field defined by LIA and *Napier*, preempted. App. 13a-14a; *see Law*, 114 F.3d at 910-11 (common-law defect and failure to warn claim preempted); *Oglesby*, 180 F.3d at 462 (LIA preempts claim of design defect and failure to warn respecting locomotive seat); *Springston*, 130 F.3d at 244-45 (LIA preempts negligence claim against railroad and manufacturer for failure to install better warning devices); *First Security*, 152 F.3d at 880-81 (LIA preempts common-law action claiming that locomotive horn should be louder); *Marshall*, 720 F.2d at 1152 (LIA preempted negligence claim against railroad for failure to install better warning devices). There is nothing to review in that.

Petitioners protest that the state strict liability duties they seek to impose "did not exist" when LIA was enacted. (Pet. 18-19) They cite no case that permits avoidance of field preemption on that theory. For good reason. Congress occupied the field of locomotive parts and equipment and state law in that field is preempted, whether the law precedes the occupation or comes after it; Congress's occupation of the field does not invite new state law to intrude on it. In any event, *Napier* disposes of the argument. The state statutes there at issue were enacted after LIA, yet this Court found LIA preempted them. *Napier*, 272 U.S. at 607 (state statutes at issue were enacted in 1923 and 1924, after LIA occupied field).

Petitioners argue that their claims, although within the preempted field, are saved because brought against a manufacturer who made the engine rather than the operator who ran it. (Pet. 17-18) No appellate court has ever permitted avoidance of field preemption on that ground either. To the contrary, every federal circuit to consider the argument rejects it, and holds that LIA preempts claims state law directed at locomotive manufacturers when it seeks to regulate matters within the occupied field. *Law*, 114 F.3d at 911-12; *Oglesby*, 180 F.3d at 462; *Springston*, 130 F.3d at 244-45; *see also First Security*, 152 F.2d at 880-81 (quoting *Law*); *see* App. 14a. Other than California – which agrees with the federal cases – no highest state court has reached the issue, to our knowledge.[16]

Those uniform rulings are right. First, LIA by its terms applies to manufacturers, contrary to petitioner's claim. (Pet. 17) LIA expressly applied to "manufacturer[s] . . . of railroad equipment" before 1994, 45 U.S.C. § 34 (1993 version, currently restated and recodified at 49

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[16] Petitioners cite a district court decision, *Lorincie v. Southwestern Pennsylvania Transp. Auth.*, 34 F. Supp. 2d 929 (E.D. Pa. 1998), that defies the unanimous federal circuit authority and, in fact, relies on overruled decisions – the district court decision reversed by the Second Circuit in *Ogelsby* and a California case overruled by the state Supreme Court here. *See Lorincie*, 34 F. Supp. 2d at 932 n.3; *Ogelsby*, 180 F.3d at 462 (overruling district court decision relied on in *Lorincie*); App. 16a n.6 (overruling California court of appeal decision relied on in *Lorincie*). This Court does not ordinarily review claimed conflicts with district court decisions even if they are based on good authority. S. Ct. R. 10.

U.S.C. § 21302).[17] The 1994 recodification act omitted that as "surplus" (*see* 49 U.S.C. § 21302 and note), but the recodifying act's own text and legislative history make clear that Congress intended no substantive change. Agency regulations reflect LIA's application to manufacturers; they penalize any "manufacturer . . . of railroad equipment . . . who violates any requirement of . . . the Locomotive Inspection Act" – or who "causes the violation of any such requirement." 49 C.F.R. § 229.7(b), § 230.0 (similar).

Second, even if LIA did not specifically mention manufacturers, the preempted field is defined by the Secretary's authority, and includes the "design" and "construction" of the locomotive and its parts. *Napier*, 272 U.S. at 611. Manufacturers necessarily are at the center of that field; they design and construct locomotives.[18] If states could set standards as to the locomotives a manufacturer designs and constructs, manufacturers would have to build and sell locomotives and locomotive parts

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[17] When Congress expressly mentioned manufacturers in 1992, the provision did not "broaden the Secretary's jurisdiction," but made "explicit" the Secretary's "current authority" and "existing power over entities whose activities relate to rail safety," codifying the way the FRA "currently interprets rail safety laws." H.R. Rep. No. 205, 102d Cong., 2d sess. 18, *reprinted in* 1992 U.S.C.C.A.N. 866, 879. *See also* n.12.

[18] Likewise, field preemption turns on whether the subject of the claim is within the preempted field – not "on whom the legal duty is imposed." *See Law*, 114 F.3d at 911-12; *Oglesby*, 180 F.3d at 462; *Taylor AG Indust. v. Pure-Gro*, 54 F.3d 555, 561 n.3 (9th Cir. 1995). The subject of this claim is motors, brake shoes, steam generators and so forth. That subject is squarely within the preempted field, and so preempted.

that complied with those state standards. Railroads would likewise have to buy those locomotives and parts built to comply with those state standards; after all, they can only buy what the manufacturers build and sell. The upshot would be exactly what LIA and *Napier* forbid.

> If each state were to adopt different liability-triggering standards, manufacturers would have to sell locomotives and cars whose equipment could be changed as they crossed state lines, or adhere to the standard set by the most stringent state. Either way, Congress's goal of uniform, federal railroad regulations would be undermined. . . .
>
> Imposing tort liability on railroad equipment manufacturers would . . . forc[e] them to conform to design and construction standards imposed by the states. This would transfer the regulatory locus from the Secretary of Transportation to the state courts – a result the [LIA] was clearly intended to foreclose.

See Law, 114 F.3d at 910-13. Thus, exempting claims against manufacturers from the preempted field would make state, not federal, law the ultimate regulator; destroy uniformity; and leave locomotive design to "the varying and uncertain opinions and verdicts of juries" – the opposite of Congress's intent and exactly what its field preemption was intended to avoid.

As the California Supreme Court held, "[s]anctioning state common law actions against manufacturers would raise the same concerns for impairing nationwide uniformity essential to the regulation of railroads as would sanctioning such actions against operators." (App. 14a) Every circuit to address the question agrees and no state

appellate court holds otherwise. P. 7, above. There is, again, nothing to review.

Napier has been the law for over 70 years. Petitioners cite no case from any court that questions *Napier*'s controlling force over claims like these, and no case that would allow their claims to proceed. Petitioners present no issue to review here.

CONCLUSION

The petition for a writ of certiorari should be denied.

DATED: September 28, 2000.

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